No. 2338

United States

Circuit Court of Appeals

For the Ninth Circuit.

PIONEER MINING COMPANY, a Corporation,

Appellant,

vs.

JOHAN TYBERG, alias EDWIN JOHANSON, and JOHN SUNDBACK, as Clerk of the District Court for the District of Alaska, Second Division,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Alaska, Second Division.

FILED
DEC 4 - 1913

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index.

Attorneys of Record.

G. J. LOMEN, Nome, Alaska,
O. D. COCHRAN, Nome, Alaska,
Attorneys for Plaintiff.
O. L. WILLETT, Seattle, Wash.,
GEO. B. GRIGSBY, Nome, Alaska,
B. S. RODEY, Nome, Alaska,
Attorneys for Defendants.

In the District Court for the District of Alaska, Second Division.

No. ———.

PIONEER MINING COMPANY, a Corporation, Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON, and JOHN SUNDBACK, as Clerk of Said Court,

Defendants.

Summons.

The President of the United States of America, to Johan Tiberg, *alias* Edwin Johanson and John Sundback, as Clerk of said Court, Greeting:

You are hereby summoned and required to appear and answer the complaint of the plaintiff on file in the office of the Clerk of said Court, at the City of Nome, in said District, within thirty days from the service of this summons upon you, or judgment for want thereof will be taken against you; and you are hereby notified that if you fail to answer the said

complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

WITNESS the Honorable CORNELIUS D. MURANE, *Clerk* of the District Court, and the Seal of the said Court hereto affixed this 29th day of October, 1912.

[Court Seal] J. SUNDBACK,
Clerk of the District Court for the District of Alaska, Second Division.

By J. Allison Bruner,
Deputy Clerk. [1*]

United States of America,
District of Alaska,
Second Division,—ss.

I hereby certify that I received the annexed summons on the 29th day of October, 1912, and thereafter on the same date I served the same at Nome, Alaska, upon Johan Tiberg and John Sundback, as Clerk of the District Court, District of Alaska, Second Division, by delivering to and leaving with each of them a copy thereof, together with a certified copy of the complaint filed therein.

Returned this 31st day of October, 1912.

T. C. POWELL,
United States Marshal.
By H. H. Darrah,
Deputy.

MARSHAL'S COSTS:

2 Services.....$12.00

[Endorsed]: #2425. No. ——. In the District Court for the District of Alaska, Second Division.

*Page-number appearing at foot of page of original certified Record.

Pioneer Mining Company, Plaintiff, vs. Johan Tiberg et al., Defendants. Summons. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Nov. 6, 1912. John Sundback, Clerk. By ————, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Plaintiff, Nome, Alaska. 3469. [2]

In the District Court for the District of Alaska, Second Division.

No. ———.

PIONEER MINING COMPANY, a Corporation, Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON, and JOHN SUNDBACK, as Clerk of Said Court,

Defendants.

Complaint.

The plaintiff above named complains and alleges:

I.

That the plaintiff is a corporation duly organized, created and existing under the laws of the State of Washington, and doing business in the District of Alaska.

II.

That the defendant John Sundback is the duly appointed and acting Clerk of the District Court for the District of Alaska, Second Division.

III.

That the defendant Johan Tiberg, during the

month of July, 1910, was in the employ of the plaintiff as foreman of the night shift in mining upon the Winter Fraction Placer Mining Claim, in the Cape Nome Recording District, District of Alaska.

IV.

That on or about the 22d day of July, 1910, the said plaintiff was the owner of, and in possession of, the premises above mentioned, and was the owner of, and lawfully [3] possessed of, certain sluice-boxes situated upon said mining claim, and of the gold-dust and amalgam therein.

V.

That on or about the date last aforesaid the defendant Johan Tiberg wrongfully and unlawfully took and carried away from said sluice-boxes gold-dust, nuggets and amalgam, the said property of plaintiff, of the value of Fifteen Thousand Dollars, and converted the same to his own use.

VI.

That thereafter and in the month of September, 1910, the said Tiberg, after having retorted said amalgam, proceeded to the city of Seattle, State of Washington, and there sold to the United States Assay Office in said city the said gold-dust and amalgam so retorted, and received therefor a certificate representing the value of said gold-dust and amalgam amounting to the sum of Fourteen Thousand Three Hundred Forty-five and 02/100 Dollars.

VII.

That thereafter the said Johan Tiberg, *alias* Edwin Johanson, cashed said certificate and received therefor the sum of Five Thousand Three Hundred

and Forty-five and 02/100 Dollars in cash and a draft drawn by the Union Savings & Trust Company on the First National Bank of Portland, Oregon, payable to Edwin Johanson or order, in the sum of Nine Thousand Dollars; and thereafter and during the month of September, 1910, the defendant Johan Tiberg was arrested by a deputy United States marshal in the city of Seattle, Washington; and the said moneys and draft were found upon his person and transmitted to the defendant John Sundback, Clerk as aforesaid, as the proceeds of stolen property belonging to plaintiff. [4]

VIII.

That thereafter the said John Sundback caused to be cashed the said draft and received the money therefor in the sum of Nine Thousand Dollars.

IX.

That by reason of the premises, a trust resulted in favor of the said plaintiff and attached to the said proceeds of said gold-dust and amalgam so taken by said Tiberg and exchanged by him as aforesaid, and now in the hands of said defendant clerk as aforesaid, and the *the* defendants have, by implication, agreed with the plaintiff that they would hold said proceeds of said gold-dust and amalgam upon a resulting trust for the plaintiff, and the same is now so held by them.

X.

Plaintiff further alleges that the defendant Johan Tiberg now claims to be the owner of said proceeds of said gold-dust and amalgam, and claims that the said defendant John Sundback, clerk, as aforesaid, holds said proceeds for his use and benefit, and re-

pudiates said trust and denies that the plaintiff has any interest in said property.

XI.

That the defendant Johan Tiberg is insolvent, and that said proceeds are now in the possession of said John Sundback, clerk as aforesaid, *in custodia legis,* and is not now subject to attachment or garnishment; that plaintiff has no adequate remedy at law.

XII.

The plaintiff further alleges that unless the defendant Johan Tiberg be enjoined and restrained from claiming, demanding and receiving said proceeds of said gold-dust and amalgam, that said defendant Sundback, [5] clerk, as aforesaid, will deliver up said proceeds to his said codefendant, to plaintiff's irreparable injury and damage.

XIII.

That said proceeds of said gold-dust and amalgam are of the value of Fourteen Thousand Three Hundred and Forty-five and 02/100 Dollars.

WHEREFORE plaintiff prays judgment that defendants be enjoined from claiming or holding said proceeds and it be decreed that plaintiff is the owner of all of said proceeds of said gold-dust and amalgam now in the hands of said defendants as aforesaid, and that said property and said proceeds be delivered up to the plaintiff, and that plaintiff have judgment for its costs and disbursements herein; and that plaintiff have such other and further relief as to the Court may seem just and equitable.

O. D. COCHRAN,
G. J. LOMEN,
Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

Jafet Lindeberg, being first duly sworn, deposes and says:

THAT he is the president of the Pioneer Mining Company, the plaintiff above named; that he has read the foregoing complaint, knows the contents thereof and that the same are true as he verily believes.

JAFET LINDEBERG.

Subscribed and sworn to before me this the 28th day of October, 1912.

[Notarial Seal] G. J. LOMEN,
Notary Public in and for the District of Al. [6]

[Endorsed]: #2425. No. ——. In the District Court for the District of Alaska, Second Division. Pioneer Mining Company, Plaintiff, vs. Johan Tiberg et al., Defendants. Complaint. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 29, 1912. John Sundback, Clerk. By ————, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Plaintiff, Nome, Alaska. [7]

In the District Court for the District of Alaska, Second Division.

No. ———.

PIONEER MINING COMPANY, a Corporation,
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON, and JOHN SUNDBACK, as Clerk of Said Court,
Defendants.

Motion [for Order Requiring Defendants to Show Cause, etc.]

Comes now the plaintiff in the above-entitled action, and moves the Court for an order requiring the defendants above named to show cause before the said Court at the courthouse in the city of Nome, District of Alaska, at a time to be named in said order *o'clock,* why the defendant Johan Tiberg should not be enjoined and restrained from demanding and receiving the proceeds of gold-dust and amalgam mentioned in the complaint, and why the defendant John Sundback, clerk of said Court, should not be enjoined and restrained from delivering up to said Johan Tiberg, or his order, the said proceeds, and that in the meantime, and until the further order of this Court, the said defendant Johan Tiberg be enjoined and restrained from demanding or receiving said proceeds, and that the defendant John Sundback be enjoined and restrained from delivering up said proceeds to said Johan Tiberg or his order.

This motion is based upon the affidavit of Jafet Lindeberg hereto attached, and the complaint in said action filed herein.

O. D. COCHRAN,
G. J. LOMEN,
Attorneys for Plaintiff. [8]

In the District Court for the District of Alaska, Second Division.

PIONEER MINING COMPANY, a Corporation, Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON, and JOHN SUNDBACK, as Clerk of Said Court,

Defendants.

Affidavit [of Jafet Lindeberg].

District of Alaska,
Cape Nome Precinct,—ss.

Jafet Lindeberg, being first duly sworn, deposes and says:

THAT he has read the complaint of the plaintiff, in the above-entitled action and that the facts therein stated are true as he verily believes.

JAFET LINDEBERG.

Subscribed and sworn to before me this the 28th day of October, 1912.

[Notarial Seal] G. J. LOMEN,
Notary Public in and for the District of Alaska.

[Endorsed]: No. 2425. In the District Court for the District of Alaska, Second Division. Pioneer

Mining Company, Plaintiff, vs. Johan Tiberg et al., Defendants. Motion and Affidavit. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 29, 1912. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Plaintiff, Nome, Alaska. [9]

In the District Court for the District of Alaska, Second Division.

No. ———.

PIONEER MINING COMPANY, a Corporation,
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON and JOHN SUNDBACK, as Clerk of Said Court,
Defendants.

Order [Requiring Defendants to Show Cause, and Enjoining and Restraining Defendant Johan Tiberg, etc.]

Upon reading and filing the complaint in the above-entitled action, and the affidavit of Jafet Lindeberg herein, upon motion of O. D. Cochran and G. J. Lomen, attorneys for plaintiff, it is

ORDERED that the defendants above-named shall show cause, if any they have, why they should not be enjoined and restrained, the said Johan Tiberg, from demanding and receiving the proceeds from the gold-dust and amalgam mentioned in the Complaint, and why the said defendant John Sundback, clerk

as aforesaid, should not be enjoined and restrained from delivering up to said Johan Tiberg, or his order, the said proceeds; said cause if any, to be shown to the Court at the courthouse in the city of Nome, District of Alaska, on the 29th day of Oct., 1912, at the hour of 1 o'clock.

It is further ordered that until said hearing, and until further order of the Court, the said defendant be enjoined and restrained, the said Johan Tiberg, his agents and attorneys, from demanding or receiving the proceeds of said gold-dust and amalgam mentioned in the complaint, and the said defendant John Sundback, clerk as aforesaid, from [10] delivering up to said Johan Tiberg, or his order, the said proceeds or any part thereof.

CORNELIUS D. MURANE,
District Judge.

United States of America,
District of Alaska,
Second Division,—ss.

I hereby certify that I received the annexed Order on the 29th day of October, 1912, and thereafter on the same date I served the same at Nome, Alaska, upon Johan Tiberg and John Sundback, as clerk of the District Court, District of Alaska, Second Division, by delivering to and leaving with each of them a copy thereof, certified to be such by the Clerk of the District Court, District of Alaska, Second Division.

Returned this 29th day of October, 1912.

T. C. POWELL,
United States Marshal.
By H. H. Darrah,
Deputy.

MARSHAL'S COSTS:

2 Services..... .....$12.00

[Endorsed]: No. 2425. In the District Court for the District of Alaska, Second Division. Pioneer Mining Company, Plaintiff, vs. Johan Tiberg et al., Defendants. Order. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 29, 1912. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Plaintiff, Nome, Alaska. 3469. Vol. 10, Orders and Judgments, p. 15. C. [11]

In the District Court, District of Alaska, Second Division.

PIONEER MINING COMPANY, a Corporation,
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON and JOHN SUNDBACK, as Clerk of Said Court,
Defendants.

Demurrer [to Complaint].

Comes now the defendant, Johan Tiberg, and demurs to the complaint of the plaintiff on file herein for the following grounds:

1.

That said complaint does not state facts sufficient to constitute a cause of action.

Dated at Nome, Alaska, February ——, 1913.

O. L. WILLETT,
GEO. B. GRIGSBY,
Attorneys for Deft. Johan Tiberg.

Service of above demurrer admitted Feb. 8th, 1913.

O. D. COCHRAN,
Of Attys. for Plf.

[Endorsed]: No. 2425. In the District Court for the District of Alaska, Second Division. Pioneer Mining Co., Plaintiff, vs. Johan Tiberg, etc., et al., Defendants. Demurrer. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Feb. 8, 1913. John Sundback, Clerk. By ————, Deputy. Geo. B. Grigsby, Atty. for Deft. Tiberg. **[12]**

[Order Sustaining Demurrer to Complaint, etc.]

In the District Court for the District of Alaska, Second Division.

TERM MINUTES, General 1913 Term, Beginning January 6, 1913.

Saturday, June 28, 1913, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of Court the following proceedings were had:

2425.

PIONEER MINING CO.

vs.

TIBERG et al.

The Court having under consideration the defendant's demurrer to plaintiff's complaint, announced that said demurrer was sustained; memo-opinion filed. Mr. Geo. B. Grigsby moved the Court for an order directing the clerk of the court to turn over the money belonging to the defendant now in the hands of the clerk; motion continued until Wednesday next. Mr. G. J. Lomen, on behalf of the plaintiff, moved the Court to fix the amount of bond on appeal, which motion was continued until Wednesday, next. **[13]**

In the District Court for the District of Alaska, Second Division.

PIONEER MINING COMPANY, a Corporation,
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON and JOHN SUNDBACK, as Clerk of Said Court,
Defendants.

Opinion.

COCHRAN & LOMEN, for the Plaintiff.
GRIGSBY and WILLETT, for the Defendant.

Before MURANE, District Judge.

Plaintiff brings this suit in equity for the pur-

pose of impressing a trust upon certain funds now in the hands of John Sundback as duly appointed Clerk of the Court of the District of Alaska, Second Division, and alleges in its bill that the defendant, Johan Tiberg, during the month of July, 1910, was in the employ of plaintiff as foreman of the night shift in mining upon a certain placer claim in this division. That during said month of July the plaintiff was the owner of and in possession of said claim and of certain sluice-boxes situated thereon, and of the gold-dust and the amalgam therein. That the defendant, Johan Tiberg, about the 22d day of July, 1910, wrongfully and unlawfully took and carried away from said sluice-boxes gold-dust, nuggets and amalgam, the said property of plaintiff, of the value of fifteen thousand dollars ($15,000), and converted the same to his own use.

That thereafter and in the month of September, 1910, the said Tiberg, after having retorted said amalgam, proceeded to the [14] city of Seattle, State of Washington, and there sold to the United States Assay office in said city, the said gold-dust and amalgam so retorted, and received therefor a certificate representing the value of said gold-dust and amalgam, amounting to the sum of fourteen thousand, three hundred forty-five and two-hundredths dollars ($14,345.02).

That thereafter the said Johan Tiberg, *alias* Edwin Johanson cashed said certificate and received therefor the sum of five thousand three hundred and forty-five and two hundredths dollars ($5,345.02) in cash and a draft drawn by the Union Savings &

Trust Company on the First National Bank of Portland, Oregon, payable to Edwin Johanson or order, in the sum of nine thousand dollars; and thereafter and during the month of September, 1910, the defendant Johan Tiberg was arrested by a United States deputy marshal, in the city of Seattle, Washington, and the said moneys and draft were found upon his person and transmitted to the defendant, John Sundback, clerk as aforesaid, as the proceeds of stolen property belonging to plaintiff.

That thereafter the said John Sundback caused to be cashed the said draft and received the money therefor in the sum of nine thousand dollars ($9,000).

That by reason of the premises a trust resulted in favor of the said plaintiff and attached to the said proceeds of said gold-dust and amalgam so taken by said Tiberg and exchanged by him as aforesaid, and now in the hands of said defendant clerk, as aforesaid, and the defendants have, by implication, agreed with the plaintiff that they would hold said proceeds of said gold-dust and amalgam upon a resulting trust for the plaintiff, and the same is now so held by them.

Plaintiff further alleges that the defendant Johan Tiberg now claims to be the owner of said proceeds of said gold-dust and amalgam, and claims that the said defendant, John Sundback, clerk as aforesaid, holds said proceeds for his use and benefit, and repudiates said trust, and denies that the plaintiff has any interest in said property.

That the defendant Johan Tiberg is insolvent, and that said proceeds are now in the possession of said

John Sundback, clerk as [15] aforesaid, *in custodia legis*, and is not now subject to attachment or garnishment; that plaintiff has no adequate remedy at law.

The plaintiff further alleges that unless the defendant Johan Tiberg be enjoined and restrained from claiming, demanding and receiving said proceeds of said gold-dust and amalgam, that said defendant Sundback, clerk as aforesaid, will deliver up said proceeds to his said codefendant, to plaintiff's irreparable injury and damage.

That said proceeds of said gold-dust and amalgam are of the value of fourteen thousand three hundred and forty-five and two-hundredths dollars ($14,345.02).

Wherefore plaintiff prays judgment that defendants be enjoined from claiming or holding said proceeds and it be decreed that plaintiff is the owner of all of said proceeds of said gold-dust and amalgam now in the hands of said defendants as aforesaid, and that said property and said proceeds be delivered up to the plaintiff, and that plaintiff have judgment for its costs and disbursements herein; and that plaintiff have such other and further relief as to the Court may seem just and equitable.

To this complaint the defendant Tiberg interposed a general demurrer, alleging that the complaint does not state facts sufficient to constitute a cause of action.

After oral arguments, the attorneys for the respective parties submitted written briefs. The defendant contends that the bill does not state a cause

of action either at law or in equity, first, because it appears upon the face of the bill that the money, or property, was taken from the person of the defendant Tiberg by an officer of the law, after having placed Tiberg under arrest, and is now *in custodia legis;* and second, because the property in question is not a trust fund nor the proceeds of a trust fund, and that no fiduciary or trust relation at any time existed between the defendant Tiberg and the plaintiff company with relation to the amalgam or its proceeds, and that consequently equity has no jurisdiction and cannot impress a trust under such circumstances.

Plaintiff contends, through its attorneys, that when property **[16]** has been stolen, equity recognizes that the property always belongs to the true owner, and therefore the proceeds must also belong to him and may be reclaimed in a suit in equity against anyone holding in bad faith, and insists that neither a fiduciary relation nor a trust estate is necessary to give a court of equity jurisdiction, and further that no right of the defendant under the Fourth Amendment of the Constitution of the United States would be violated by holding the monies taken from the person of the defendant by a United States deputy marshal after the arrest of the defendant upon criminal process. This briefly states the facts as they appear from the pleadings and the contentions of the respective parties.

We will first consider the question of the jurisdiction of a court of equity to impress a trust upon property or the proceeds of property, where the

original property was not a trust estate and no fiduciary relation existed between the owner and the person converting or appropriating the same. In this case, the complaint does not show the defendant to have been in a position of trust or confidence; in other words, he was not the custodian, trustee, nor bailee of the amalgam, gold-dust and nuggets contained in the sluice-boxes of plaintiff.

The great weight of authority seems to be that unless some such relation exists, no trust arises by implication of the law, either *ex maleficio* or *in invitum*. The following are a few of the many definitions of a trust given by the Courts:

"A trust in common parlance may be said to be a confidence reposed by someone in someone for some public or private purpose."

Ex parte Faulkner, 1 W. Va. 269, 298.

"A trust signifies a holding of property subject to a duty of employing it or applying its proceeds according to the directions given by the person from whom it was derived."

Monroe vs. Crouse, 12 N. Y. Supp. 815.

"A trust in its simplest elements is a confidence reposed in one person who is termed 'trustee' for the benefit of another who is called the 'cestui que trust,' and it is a confidence respecting property which is thus held by the former for the benefit of the latter."

Carter vs. Gibson, 45 N. W. 634.

"A trust is an equitable obligation either expressed or implied, resting upon a person by reason of a confidence reposed in him to apply or deal

with the property for the benefit of some other person, or for the benefit of himself and another or others, according to such confidence."

McCreary vs. Gewinner, 29 S. E. 960. [17]

A trustee, in the widest meaning of the term, is defined to be a person in whom some estate, interest, or power in or affecting property of any description, is vested for the benefit of another.

Taylor vs. Davis, 110 U. S. 330.

Truedale vs. Philadelphia Trust Safe Deposit & Ins. Co., 65 N. W. 133.

Robertson vs. Bullions, 9 Barb. 64, 101.

In Henninger vs. Heald, 30 Atl. 809, the Court says, "The wrongdoer who becomes possessed of property under such circumstances as amount to a tort has been styled 'a trustee,' but this is for want of a better term and because he has no title to the property and really holds it for the true owner. It might as well be said that where two persons conspire to possess themselves of the personal property of another when he brings trover for its recovery, they should be styled 'trustees' instead of 'tort-feasors' and should be permitted to claim the benefit of a lien for care or for provender."

All instances of constructive trusts may be referred to what equity denominates fraud, either actual or constructive in violation of fiduciary obligation. Perry, in his work on Trusts, defines constructive trusts as "those which arise when a person clothed with some fiduciary character, by fraud or otherwise, gains some advantage to himself."

Again, in section 128, "if one who stands in no fiduciary relation appropriates another's money and invests it in property, no trust results to the owner of the money."

The complaint does not show that the defendant appropriated a trust fund. He was employed as night foreman in mining, but his relation to the amalgam appears no different from that of any other laborer. Under such a state of facts and the foregoing authorities, it appears clear that equity would have no jurisdiction to impress a trust upon the fund in question.

Upon the other question, it appears from the complaint that the fund in question was taken from the person of the defendant Tiberg after his arrest on a criminal charge. Art. IV, Amendments to the Constitution, protects a person, his house, papers, and effects, against unreasonable search and seizure. A person arrested on a criminal warrant may be searched, and anything which is evidence of the commission of the crime with which he is charged, or with which he may do personal violence to himself or others, or by means of which he may effect an escape, may be taken from his person and held by the officer having the prisoner in charge. This is permitted on the grounds of public policy, but no individual citizen should **[18]** be permitted to take advantage of this necessary violation of the person of the prisoner. The case of Dahms vs. Sears, reported in the 11th Pacific Reporter, pgs. 895–896, very clearly states what appears to be the true rule.

"I am of the opinion that property taken from

a prisoner under such circumstances is not the subject of attachment or levy by virtue of an execution. The security of the public may justify the searching of a prisoner confined in prison upon criminal or even civil process, and the taking from him of any property in his possession that would aid him to make an escape. It would probably be regarded, under such circumstances, as a reasonable search and seizure; but to allow private parties to take advantage of the circumstances in order that they may secure a personal benefit would be a violation of that faith which the commonwealth owes to persons held in custody under its authority and laws. It would lead to oppression and abuse. The object and purpose of an arrest under civil and criminal process would be perverted, and schemes and devices be resorted to by importunate creditors to enforce a payment of their demands that would outrage justice and the right to personal security. The case under consideration is not free from suspicion that unscrupulous measures were employed for the purpose indicated. The attachment of the money taken from the person of Keltener followed in very quick succession its seizure, and gives rise to the inference that collusion existed between the officers of the prison and the representatives of the creditors. One of the attachments was levied upon the money the same day it was taken from Keltener."

See, also, Cooley's Constitutional Limitations, 5th ed., pp. 365–373 and notes.

The case of the State of Iowa vs. Williams, 16 N.

W. 586, is one very similar to the one at bar, and holds that before any third party can proceed against property taken from a prisoner, the *statu quo* must be restored, especially so after a trial and an acquittal. It may be suggested that the complaint does not show a trial and an acquittal in the case in which Tiberg was arrested and the fund in question taken from his person. Neither does the complaint show a conviction in that case, and under our law the presumption of innocence must be indulged until a conviction is shown. What plaintiff's remedy is under our statute is not necessary for the consideration of the Court at this time.

The principal case relied upon by plaintiff is Aetna Indemnity Co. of Hartford, Conn., vs. Malone et al., 131 N. W. 200. It will be observed in that case that the defendants had been convicted and the controversy was between other parties and no question of constitutional right seems to have been raised or involved, and the only **[19]** authority cited in the opinion is Newton vs. Porter, 5th Lans. (N. Y.) 416.

Had the defendant Tiberg been convicted in the criminal case, the plaintiff would undoubtedly have received the fund in controversy, under Sec. 266, Ch. 30 of the Code of Alaska, but the defendant not having been convicted, it would seem, as said in the Iowa case, he was entitled to go out of court and be placed in the same situation in which he was before the money was taken. This rule will undoubtedly do injustice in some instances, but it is better that injustice be done sometimes to an individual than that the personal liberties, private documents and per-

sonal effects of the masses be placed at the mercy of unscrupulous litigants.

Par. X of the complaint shows that the defendant Tiberg claims to be the owner of the fund in controversy, and denies that plaintiff has any interest in the fund. Therefore, the main question to be passed upon is the question of title to the personal property held by the clerk of the court, and if it is not a trust fund, parties have a constitutional right to have the question of title passed upon by a jury.

The bill does not state a cause of suit in equity, and plaintiff's attorneys admit that it does not state a cause of action at law; therefore the demurrer should be sustained and it is so ordered.

Dated this 28th day of June, 1913, Nome, Alaska.

[Endorsed]: #2425. In the District Court for the District of Alaska, Second Division. Pioneer Mining Co. v. Johan Tiberg and John Sundback. Opinion. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 28, 1913. John Sundback, Clerk. By ————, Deputy. **[20]**

In the District Court for the District of Alaska, Second Division.

No. ———.

PIONEER MINING COMPANY, a Corporation,
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON and JOHN SUNDBACK, as Clerk of Said Court,
Defendants.

Amended Complaint.

The plaintiff above named, for its amended complaint herein, complains and alleges:

I.

That the plaintiff is a corporation duly organized, created and existing under the laws of the State of Washington, and doing business in the District of Alaska; and during the times hereinafter mentioned was such corporation.

II.

That the defendant John Sundback is the duly appointed and acting clerk of the District Court for the District of Alaska, Second Division.

III.

That the defendant Johan Tiberg, during the month of July, 1910, was in the employ of the plaintiff as foreman of the night-shift in mining upon the Winter Fraction Placer Mining Claim in the Cape Nome Recording District, District of Alaska, the property of said plaintiff.

IV.

That on or about the 22d day of July, 1910, the said plaintiff, then and there the owner of said mining claim [21] and in the possession thereof, was also the owner of, and in the possesion of, certain sluice-boxes situated upon said mining claim, and of the gold-dust, nuggets and amalgam therein.

V.

That as foreman and employee of the plaintiff as aforesaid, the defendant Johan Tiberg had the care and custody of said sluice-boxes, gold-dust, nuggets and amalgam therein, and it was then and there his duty to protect and safeguard the same and not to remove from said sluice-boxes, or permit to be removed therefrom, said gold-dust, nuggets and amalgam; that notwithstanding his said employment and duties, and on or about the date last aforesaid, the said defendant Johan Tiberg wrongfully and unlawfully, and without the leave or consent of the plaintiff, took and carried away from said sluice-boxes, the said gold-dust, nuggets and amalgam, the said property of the plaintiff, and of the value of Fifteen Thousand Dollars ($15,000.00), and upwards, concealed the same from plaintiff, and converted the same to his own use, and has, ever since, failed and neglected to account to the plaintiff therefor.

IV.

That thereafter, and in the month of September, 1910, the said Tiberg, after having retorted said amalgam, proceeded to the city of Seattle, State of Washington, and there sold to the United States Assay Officer in said city the said gold-dust, nuggets

and amalgam so retorted, and received therefor a certificate representing the value of said gold-dust, nuggets and amalgam amounting to the sum of fourteen thousand three hundred forty-five and two-hundredths dollars ($14,345.02).

VII.

That thereafter, and during said month of September, the said Johan Tiberg, *alias* Edwin Johanson, presented [22] said certificate to the Union Savings and Trust Company for payment, and received in payment of said certificate the sum of five thousand three hundred forty-five and two-hundredths dollars ($5,345.02) in cash, and a draft drawn by said Union Savings and Trust Company on the First National Bank of Portland, Oregon, payable to said Edwin Johanson, or order, in the sum of nine thousand dollars ($9,000.00).

VIII.

That thereafter and also during the month of September, 1910, the said defendant Johan Tiberg, was arrested by a deputy United States marshal in the city of Seattle, State of Washington, charged with the crime of larceny of said gold-dust, nuggets and amalgam, and said moneys and draft, the proceeds of said gold-dust nuggets and amalgam, were found by said deputy marshal in the possession of said defendant Johan Tiberg, and were, by said deputy marshal, seized as the proceeds of said stolen property, and as such proceeds were transmitted and delivered to the defendant John Sundback as Clerk of said Court.

IX.

That thereafter the said John Sundback caused the

said draft so received by him to be cashed, and received in payment thereof the sum of nine thousand dollars, face value of said draft, and now has in his possession the said proceeds of said gold-dust, nuggets and amalgam so converted by the defendant Tiberg, as aforesaid, and so converted into cash, to wit the sum of fourteen thousand three hundred forty-five and two-hundredths dollars ($14,345.02); that said John Sundback received said moneys as Clerk of said Court, and has held the same for and on account of the case of the United States against said Johan Tiberg now adjudicated in said Court, and should now hold the same on account of this action. [23]

X.

That said defendant Tiberg is insolvent, and is not now, as plaintiff is informed and believes, an inhabitant of the District of Alaska; that said defendant John Sundback, as plaintiff is informed and believes, neither has or claims any interest in said proceeds, except as a mere depositary thereof, for the use and benefit of the true owner thereof, and holds the same subject to the orders and directions of the said Court and not otherwise.

XI.

That the defendant Tiberg has demanded, by oral motion addressed to said Court, the return to him of said deposit in the hands of his said codefendant, and threatens to demand and claim the same, and unless restrained from so doing he will demand and claim said deposit and the said proceeds of said gold-dust, nuggets and amalgam from his said codefendant

Sundback, and of this Court.

XII.

That by reason of the premises, the defendant Tiberg is liable to an accounting to plaintiff, and there is now due and owing plaintiff from the said defendant Tiberg, *and* said sum of fourteen thousand three hundred forty-five and two-hundredths dollars ($14,345.02), and a constructive trust in favor of said plaintiff has attached to the said proceeds of said gold-dust, nuggets and amalgam, and a lien on said proceeds to the extent of said fourteen thousand three hundred forty-five and two-hundredths dollars should and ought to be declared in favor of plaintiff and in equity belongs to plaintiff.

That the said acts and threatened acts of the said defendant Tiberg were and are in violation of plaintiff's rights in and to said property and proceeds, and if said moneys shall be paid to said defendant Tiberg, the plaintiff [24] will suffer irreparable injury, loss and damage, and such payment would and said threats tend to render any judgment herein in favor of the plaintiff ineffectual.

WHEREFORE plaintiff demands judgment against the defendant Tiberg for the sum of fourteen thousand three hundred forty-five and two-hundredths dollars ($14,345.02); that plaintiff be adjudged to have a specific lien on said proceeds now in the hands of said defendant Sundback, clerk as aforesaid, to the extent of said sum of fourteen thousand three hundred forty-five and two-hundredths dollars, less the fees and charges of said clerk, if any; that said proceeds be declared to be a trust fund to

which plaintiff is equitably entitled; that pending the determination of this action said trust fund and proceeds be placed in the registry of the Court in this action, to abide the determination thereof; and that in the meantime, and forever, the defendant, his attorneys, agents and representatives, be restrained and enjoined from demanding or receiving the same —that plaintiff have judgment for its costs and disbursements herein, and for such other and further relief as to the Court shall seem just and proper.

O. D. COCHRAN,
G. J. LOMEN,
Attorneys for Plaintiff. [25]

United States of America,
District of Alaska,—ss.

L. Stevenson, being first duly sworn, according to law, deposes and says:

That he is the manager of the Pioneer Mining Company, the plaintiff above named, that he has read the foregoing amended complaint, knows the contents thereof, and that the same is true as he verily believes.

L. STEVENSON.

Subscribed and sworn to before me this the 21st day of July, 1913.

[Notarial Seal] G. J. LOMEN,
Notary Public in and for the District of Alaska.
My Comn. expires June 28, 1917.

Service of the foregoing amended complaint is

hereby admitted at Nome, Alaska, this 21st day of June, 1913.

G. B. GRIGSBY,
Atty. for Defendant Tiberg.
J. SUNDBACK,
One of Defendants.

[Endorsed]: No. 2425. In the District Court for the District of Alaska, Second Division. Pioneer Mining Company, Plaintiff, vs. Johan Tiberg, *alias* Edwin Johanson, and John Sundback as Clerk of said Court, Defendants. Amended Complaint. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 21, 1913. John Sundback, Clerk. By ————, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Plaintiff. [26]

In the United States District Court for the District of Alaska, Second Division.

No. 2425.

PIONEER MINING COMPANY, a Corporation,
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON and JOHN SUNDBACK as Clerk of said Court,
Defendants.

Demurrer [to Amended Complaint].

Comes now the defendant, Johan Tiberg, and demurs to the amended complaint filed herein on the

following ground: That said complaint does not state facts sufficient to constitute a cause of action.

GEORGE B. GRIGSBY,
Attorney for Defendant Tiberg.

Service of a copy of the foregoing Demurrer this 28th day of July, 1913, at 3:30 P. M. admitted.

G. J. LOMEN,
Of Attorneys for Plaintiff.

[Endorsed]: No. 2425. In the District Court for the District of Alaska, Second Division. Pioneer Mining Co., a Cor., Plaintiff, vs. Johan Tiberg, *alias* Edwin Johanson and John Sundback, as Clerk of said Court, Defendants. Demurrer. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 29, 1913. John Sundback, Clerk. By ————, Deputy. Geo. B. Grigsby, Attorney for Tiberg. [27]

[Order Sustaining Demurrer to Amended Complaint, etc.]

In the District Court for the District of Alaska, Second Division.

TERM MINUTES, General 1913 Term, beginning January 6, 1913. Saturday, August 9, 1913, at 11 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of court the following proceedings were had:

2425.

PIONEER MINING CO.

vs.

TIBERG et al.

Defendants' demurrer to plaintiff's amended complaint was argued and submitted to the Court, whereupon the Court made an order sustaining said demurrer. Upon motion of Mr. G. J. Lomen plaintiff was allowed an exception to said order. [28]

In the United States District Court for the District of Alaska, Second Division.

No. ———.

PIONEER MINING COMPANY, a Corporation,
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON, and JOHN SUNDBACK as Clerk of Said Court,

Defendants.

Judgment.

The above-entitled action coming on to be heard upon the application of the defendant, Johan Tiberg, that judgment be entered herein, and it appearing to the Court that the demurrer of the defendant, Johan Tiberg, to plaintiff's complaint heretofore filed herein was, on the 28th day of June, 1913, sustained by the Court, and the plaintiff having thereafter filed an amended complaint herein, and

it further appearing that the demurrer of the defendant, Johan Tiberg, to plaintiff's amended complaint herein was, on the 9th day of August, 1913, sustained by the Court, and the plaintiff having failed and refused to further amend its said complaint, it is by the Court

ORDERED, ADJUDGED and DECREED that this action be, and the same is hereby dismissed.

IT IS FURTHER ORDERED that the defendant, Johan Tiberg, have and recover from the plaintiff his costs and disbursements of suit taxed at ——— Dollars ($———).

Done in open court at Nome, Alaska, this 18th day of August, 1913.

CORNELIUS D. MURANE,
U. S. District Judge. [29]

[Endorsed]: No. 2425. In the District Court for the District of Alaska, Second Division. Pioneer Mining Co., a Cor., Plaintiff, vs. Johan Tiberg et al, Defendants. Judgment. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 18, 1913. John Sundback, Clerk. By J.A.B., Deputy. Geo. B. Grigsby, Attorney for Defendant Tiberg. Vol. 10, Orders and Judgments, p. 268. C. [30]

[Order Directing Publication of Deposition of Johan Tiberg, Denying Injunction, Dissolving Restraining Order, etc.]

In the District Court for the District of Alaska, Second Division.

TERM MINUTES, General 1913 Term, beginning January 6, 1913. Monday, August 18, 1913, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge. presiding.

Upon the convening of court the following proceedings were had:

. . . . . .

2425.

PIONEER MINING CO.

vs.

TIBERG et al.

The hearing upon the order to show cause why an injunction *pendente lite* should not issue came on regularly for hearing. Mr. G. J. Lomen, on behalf of plaintiff, filed the affidavit of Louis Stevenson.

Upon motion of Mr. Lomen, the deposition of defendant Johan Tiberg was ordered published.

The order to show cause was thereupon submitted without argument, whereupon the Court made an order denying an injunction *pendente lite* and ordered that the preliminary restraining order heretofore issued herein be dissolved.

Upon motion of Mr. G. J. Lomen, it was ordered that the property in controversy in this action remain *in statu quo,* to wit, in the hands of the Clerk of the Court, for the present and until the further order of the Court. [31]

In the District Court, District of Alaska, Second Division.

#2425.

PIONEER MINING COMPANY, a Corporation,
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON, and JOHN SUNDBACK, as Clerk of Said Court,
Defendants.

Bill of Exceptions.

This was an action in equity seeking against the defendants to impress upon $14,345.02, the proceeds of alleged stolen property in the hands of said clerk, a constructive trust, *ex maleficio,* and to restrain the defendant Tiberg from demanding or receiving said proceeds and for general relief. By way of provisional remedy, plaintiff sought an injunction, *pendente lite.* In the latter proceedings an order to show cause why the injunction should not be granted was made and served returnable at a time and place designated, and defendant Tiberg was, by said order in the meantime and until the further order of the Court, restrained from demanding or receiving said proceeds.

Complaint was filed herein on the 29th day of October, 1912, and personal service of the summons and complaint was had on the defendants. The defendant Tiberg demurred to the complaint; which demurrer coming on to be heard June 28th, 1913, was sustained and the plaintiff duly excepted, which exception was allowed. The plaintiff thereupon served and filed an amended complaint, to which the defendant Tiberg again demurred. This demurrer coming on [32] regularly to be heard, August 9th, 1913, was also sustained. The plaintiff duly excepted, and the exception was allowed. Judgment of dismissal of the action, and for costs in favor of defendant Tiberg, was thereupon, plaintiff electing to stand on its complaint, on the 18th day of August, 1913, entered; to which the plaintiff excepted and the exception was allowed. In the injunction proceedings above mentioned the demurrers to the original and amended complaints having been sustained, and the plaintiff electing not to plead over, the plaintiff's motion for injunction *pendente lite* was, on the 18th day of August, denied, and the restraining order, theretofore issued, dismissed; to all of which the plaintiff duly excepted, and exceptions were allowed.

On motion of plaintiff and notice of appeal being given, the Court thereupon fixed the amount of the supersedeas bond at $3,000.00, and ordered the proceeds aforesaid to be held in *statu quo,* subject to the further order of the Court.

And now in furtherance of justice, and that right may be done, the plaintiff presents the foregoing bill of exceptions in this cause and prays that the same

may be settled, allowed, signed and certified by the Judge of this Court as provided by law.

O. D. COCHRAN,
G. J. LOMEN,
Attorneys for Plaintiff.

Due service of the foregoing proposed bill of exceptions is hereby admitted at Nome, Alaska, this 16th day of Sept. 1913.

GEORGE B. GRIGSBY,
Atty. for Deft. Johan Tiberg.
B. S. RODEY,
Atty. for Deft. Sundback. [33]

Order Allowing Bill of Exceptions.

The foregoing Bill of Exceptions is correct in all respects, and is hereby approved, allowed and settled, and made a part of the record herein.

CORNELIUS D. MURANE,
District Judge.

Done in open court this 4 day of October, 1913.

[Endorsed]: #2425. In the United States District Court, District of Alaska, Second Division. Pioneer Mining Co., a Corporation, Plaintiff, vs. Johan Tiberg, *alias* Edwin Johanson and John Sundback, as Clerk of Said Court, Defendants. No. 2425. Bill of Exceptions. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 17, 1913. John Sundback, Clerk. By ————, Deputy. L. O. D. Cochran and G. J. Lomen, Attys. for Plff., Nome, Alaska. [34]

In the District Court for the District of Alaska, Second Division.

No. 2425.

PIONEER MINING COMPANY, a Corporation,
Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON, and JOHN SUNDBACK, as Clerk of Said Court,
Defendants.

Assignment of Errors.

Comes now the plaintiff, Pioneer Mining Company, and assigns the following errors upon which it will rely in prosecuting its appeals from the final judgment in the above-entitled action, dated August 18th, 1913, and from the order denying its application for an injunction *pendente lite* against the defendants and from the order discharging the restraining order granted on the motion for an injunction *pendente lite:*

1. The Court erred in sustaining the demurrer of the defendant, Johan Tiberg, to the original complaint in said action.

2. The Court erred in sustaining the demurrer to the amended complaint in said action.

3. The Court erred in granting defendant's motion dismissing plaintiff's complaint.

4. The Court erred in entering judgment dismissing plaintiff's complaint.

5. The Court erred in denying plaintiff's motion

for an injunction *pendente lite.*

6. The Court erred in discharging the order to show cause why an injunction *pendente lite* should not be made.

7. The Court erred in discharging the restraining order granted in said order to show cause why an injunction should not [35] be granted.

Dated at Nome, Alaska, this 9th day of October, 1913.

G. J. LOMEN,
O. D. COCHRAN,
Attorneys for Plaintiff.

[Endorsed]: No. 2425. In the District Court, District of Alaska, Second Division. Pioneer Mining Company, a Corporation, Plaintiff, vs. Johan Tyberg et al., Defendants. Assignment of Errors. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 9, 1913. John Sundback, Clerk. By J. A. B., Deputy. ————, Attys. for Plaintiff. [36]

In the District Court for the District of Alaska, Second Division.

No. 2425.

PIONEER MINING COMPANY, a Corporation, Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON, and JOHN SUNDBACK, as Clerk of Said Court,

Defendants.

Petition for Allowance of Appeal.

Comes now the plaintiff above named, and feeling itself aggrieved by the final judgment made and entered in the above-entitled cause, on the 18th day of August, 1913, dismissing said action wherein it prayed for the enforcement of a constructive trust, injunction and general relief, and, feeling itself aggrieved by the proceedings had in said cause, in denying plaintiff's application for an injunction *pendente lite* against the defendants, and in dismissing and discharging the order to show cause why an injunction *pendente lite* should not be granted, and in discharging the restraining order made as a part of said order to show cause, does hereby appeal from said final judgment and from the whole and every part thereof, and from the said order refusing and denying to plaintiff the said injunction *pendente lite,* and from the said order discharging said order to show cause, and from the said order discharging the said restraining order, to the United States Circuit Court of Appeals for the Ninth Circuit, and petitions the Court for an order allowing the said appeals.

And said plaintiff further prays that the order heretofore made by said Court, dated the 18th day of August, 1913, [37] wherein and whereby said Court, for cause shown, ordered and directed that the alleged trust fund remain in the custody of the Clerk of said Court until the further order of the Court, be continued, pending said appeals herein and until the further order of the Court, upon the filing of a good and sufficient bond, to be approved by said

Court, in the penal sum of Three Thousand (3,000) Dollars, and a cost bond in the sum of Two Hundred and Fifty (250) Dollars, or, one bond in the sum of Three Thousand Two Hundred and Fifty (3,250) Dollars, conditioned that the plaintiff shall prosecute said appeals to effect and answer for all costs and damages if he fail to make good his appeal, and shall pay, or cause to be paid, to the said defendants, their heirs, executors, administrators or assigns all damages which they shall suffer by reason of said appeals, if the same should be wrongful or without sufficient cause, and all damages which they, or either of them, shall suffer by reason of said order directing said trust fund involved in said action to be held *in statu quo* in the hands of the clerk of said Court.

And plaintiff further prays that a transcript of the proceedings upon which the said judgment and orders appealed from were made and entered, duly authenticated, may be sent to the United States Court of Appeals for the Ninth Circuit.

Dated at Nome, Alaska, this 9th day of October, 1913.

G. J. LOMEN,
O. D. COCHRAN,
Attorneys for Plaintiff. [38]

[Endorsed]: No. 2425. In the District Court, District of Alaska, Second Division. Pioneer Mining Company, a Corporation, Plaintiff, vs. Johan Tyberg et al., Defendants. Petition for Allowance of Appeal. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 9,

1913. John Sundback, Clerk. By J. A. B., Deputy.
————————, Attys. for Plaintiff. [39]

In the District Court for the District of Alaska, Second Division.

No. 2425.

PIONEER MINING COMPANY, a Corporation, Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON, and JOHN SUNDBACK, as Clerk of Said Court,

Defendants.

Order Allowing Appeal and Fixing Amount of Bond.

Upon the motion of G. J. Lomen and O. D. Cochran, attorneys for plaintiff above named.

IT IS ORDERED that the appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment and decree heretofore made and entered herein on the 18th day of August, 1913, and from the whole thereof; and from the order denying plaintiff's motion for the injunction *pendente lite* herein; and from the order discharging the order to show cause why an injunction *pendente lite* should not be granted; and from the order discharging the restraining order issued upon the granting of said order to show cause, be, and the same are, each and all, hereby allowed, as prayed for by the plaintiff.

IT IS FURTHER ORDERED that an undertaking on appeal and to secure the defendants against

damage by reason of the order heretofore made ~~and received,~~ and hereby continued, be given by the plaintiff to the defendants, in the sum of Three Thousand Two Hundred and Fifty (3250) Dollars, conditioned that the plaintiff shall prosecute said appeals to effect and [40] answer for all costs and damages if it fail to make good its appeal if the same be wrongful or without sufficient cause, and all damages which they, or either of them, shall suffer by reason of the order heretofore made and entered on the 18th day of August, 1913, directing said trust fund involved in said action to be held *in statu quo* in the hands of the Clerk of said Court; and,

IT IS FURTHER ORDERED that upon the filing of said bond, the order heretofore made directing the trust fund involved in said action to remain *in statu quo* in the hands of the Clerk of said Court, be, and the same is hereby continued, pending said appeal and until the further order of said Court.

Done in open court this 9 day of October, 1913.

CORNELIUS D. MURANE,
District Judge.

[Endorsed]: No. 2425. In the District Court, District of Alaska, Second Division. Pioneer Mining Company, a Corporation, Plaintiff, vs. Johan Tiberg et al., Defendants. Order Allowing Appeal and Fixing Amount of Bond. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 9, 1913. John Sundback, Clerk. By J. A. B., Deputy. ————, Attys. for Plaintiff. [41]

In the District Court for the District of Alaska, Second Division.

No. 2425.

PIONEER MINING COMPANY, a Corporation, Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON, and JOHN SUNDBACK, as Clerk of Said Court,

Defendants.

Undertaking.

KNOW ALL MEN BY THESE PRESENTS: That we, the PIONEER MINING COMPANY, a corporation, as principal, and L. Stevenson and G. P. Goggin, as sureties, are held and firmly bound unto the defendants above-named, in the sum of Three Thousand Two Hundred and Fifty (3250) Dollars, to be paid to the said defendants, their heirs, executors, administrators or assigns, the payment of which well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators and assigns firmly by these presents.

Sealed with our seals and dated this 9th day of October, 1913.

The condition of the above undertaking and obligation is, that whereas, the above-named plaintiff, the Pioneer Mining Company, has filed its petition for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment

of dismissal in the above-entitled action, dated August 18th, 1913; and for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of said District Court denying plaintiff's [42] motion for an injunction *pendente lite* in said action; and from an order of said District Court discharging the order to show cause why an injunction *pendente lite* should not be granted; and from the order of said District Court discharging the restraining order granted with said order to show cause;

And, whereas, the said District Court for the District of Alaska, Second Division, upon the 18th day of August, 1913, made its order directing that the trust fund involved in said action remain *in statu quo* in the hands of the Clerk of said District Court until the further order of the Court;

And, whereas, the said District Court in and by its order granting said appeals herein, continued its said order directing said trust fund to remain *in statu quo* in the hands of said Clerk pending said appeal and until the further order of said Court.

Now, therefore, if the above-named plaintiff Pioneer Mining Company shall prosecute the said appeals to effect and answer all costs and damages if it fail to make good its said appeals, and shall pay, or cause to be paid, to the said defendants, their heirs, executors, administrators and assigns all damages which they shall suffer by reason of said appeals, or any or either of them, if the same should be wrongful or without sufficient cause, and shall pay, or cause to be paid, to the said defendants, their heirs, executors,

administrators and assigns all damages which they, or either of them, shall suffer by reason of the said order of said Court directing the trust fund involved in said action to remain *in statu quo* in the hands of the Clerk of said District Court, then this obligation to be void, otherwise to remain in full force and [43] effect.

PIONEER MINING COMPANY. [Seal]
By L. STEVENSON, Mgr.,
Principal.
L. STEVENSON. [Seal]
G. P. GOGGIN. [Seal]

United States of America,
Cape Nome Precinct,—ss.

L. Stevenson and G. P. Goggin, being first duly sworn, each for himself and not one for the other, deposes and says: That he is one of the sureties named in the above-entitled undertaking; that he is a resident of the District of Alaska; that he is not an attorney at law, marshal, deputy marshal, clerk of any court, or other officer of any court; that he is worth the sum of Three Thousand Two Hundred and Fifty Dollars over and above all his just debts and liabilities, and exclusive of property exempt from execution.

L. STEVENSON.
G. P. GOGGIN.

Subscribed and sworn to before me this 9th day of October, 1913.

[Notarial Seal] G. J. LOMEN,
Notary Public in and for the District of Alaska.
My Commission expires June 27, 1917.

ORDER. The above and foregoing Undertaking and the sureties therein named are hereby approved this 9th day of October, 1913.

Done in open court this 9th day of October, 1913.

CORNELIUS D. MURANE,
District Judge. [44]

[Endorsed]: No. 2425. In the District Court, District of Alaska, Second Division. Pioneer Mining Company, a Corporation, Plaintiff, vs. Johan Tyberg et al., Defendants. Undertaking. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 9, 1913. John Sundback, Clerk. By J. A. B., Deputy. ————, Attys. for Plaintiff. [45]

UNITED STATES OF AMERICA.

District Court, District of Alaska, Second Division.

No. 2425.

PIONEER MINING COMPANY, a Corporation,
Plaintiff,

vs.

JOHAN TIBERG et al.,
Defendants.

Praecipe [for Transcript of Record on Appeal].

To the Clerk of the Above-entitled Court:

You will please make and forward to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, transcript on appeal in the above-entitled action, including summons, complaint, amended complaint de-

murrer to original complaint, demurrer to amended complaint, minute orders sustaining demurrers June 28, 1913 and Aug. 9, 1913, opinion sustaining demurrer judgment of dismissal, minute orders of Aug. 18, 1913, overruling plaintiff's motion for an injunction *pendente lite* and dismissing the order to show cause and the restraining order made and issued with the order to show cause; the motion and affidavit attached, for an injunction *pendente lite* and the order to show cause with restraining order, bill of exceptions, assignment of errors, petition for appeal, order allowing appeal, undertaking on appeal, with original citation and order extending time to docket appeal, all duly certified.

G. J. LOMEN,
Attorney for Plaintiff.

[Endorsed]: Cause No. 2425. District Court, District of Alaska, 2nd Division. Pioneer Mining Co., Plaintiff, vs. Johan Tiberg et al., Defendants. Praecipe. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 9, 1913. John Sundback, Clerk. By ————, Deputy. G. J. Lomen and O. D. Cochran, Attys. for Plff., Nome, Alaska. [46]

[Certificate of Clerk U. S. District Court to Transcript.]

In the District Court for the District of Alaska, Second Division.

No. 2425.

PIONEER MINING COMPANY, a Corporation, Plaintiff,

vs.

JOHAN TIBERG, *alias* EDWIN JOHANSON, and JOHN SUNDBACK, as Clerk of Said Court,

Defendants.

I, John Sundback, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 46, both inclusive, are a true and exact transcript of the Summons, Complaint, Motion for Injunction *Pendente Lite,* Affidavit in Support of Motion, Order to Show Cause and Temporary Restraining Order, Demurrer, Court Minutes of June 28 1913 (Sustaining Demurrer, etc.), Opinion, Amended Complaint, Demurrer to Amended Complaint, Court Minutes of August 9, 1913 (Sustaining Demurrer, etc.), Judgment, Court Minutes of August 18, 1913 (Denying Injunction Pendente Lite, etc.), Bill of Exceptions, Assignment of Errors, Petition for Allowance of Appeal, Order Allowing Appeal and Fixing Amount of Bond, Undertaking on Appeal, and Praecipe for Transcript on Appeal, in the case of Pioneer Mining

Company, a Corporation, Plaintiff, vs. Johan Tiberg et al., Defendants, No. 2425—Civil, this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Citation and original Order Enlarging Time to File and Docket Transcript on Appeal in the above-entitled cause are attached to this transcript.

Cost of transcript $18.45, paid by G. J. Lomen, of attorneys for plaintiff.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 14th day of October, A. D. 1913.

[Seal] J. SUNDBACK,
Clerk. [47]

In the District Court for the District of Alaska, Second Division.

No. 2425.

PIONEER MINING COMPANY, a Corporation,
Plaintiff,

vs.

JOHAN TYBERG, *alias* EDWIN JOHANSON, and JOHN SUNDBACK, as Clerk of Said Court,
Defendants.

Citation [on Appeal (Original)].

United States of America,
District of Alaska,—ss.

The President of the United States of America to Johan Tyberg, *alias* Edwin Johanson, and John Sundback, as Clerk of said Court, Defendants, Greeting:

You and each of you are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty days from the date of this citation, and on the 6th day of November, 1913, pursuant to an order allowing appeals herein entered in the office of the Clerk of the District Court for the District of Alaska, Second Division, from the final judgment and decree filed and entered herein on the 18th day of August, 1913, and from the order of said Court denying plaintiff's motion for an injunction *pendente lite* herein entered on the 18th day of August, 1913, and from the order discharging the order to show cause why an injunction *pendente lite* should not be granted, [48] dated August 18th, 1913, and from the order discharging the restraining order made and issued with said order to show cause, in that certain suit wherein you, the said John Tyberg, *alias* Edwin Johanson, and John Sundback as Clerk of said Court, were defendants, and the said Pioneer Mining Company was plaintiff, to show cause, if any there be, why the said final judgment and decree rendered against said plaintiff, and the

said orders above mentioned and mentioned in the order allowing appeals therefrom, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 9th day of October, 1913.

CORNELIUS D. MURANE,
District Judge.

ATTEST my hand and seal of the United States District Court for the District of Alaska, Second Division, at the Clerk's office at Nome, Alaska, this 9th day of October, 1913.

[Seal] J. SUNDBACK,
Clerk of the United States District Court for the District of Alaska, Second Division.

By J. Allison Bruner,
Deputy.

Service of the above and foregoing citation is hereby acknowledged by receipt of copy this 9th day of October, 1913.

GEORGE B. GRIGSBY,
Attorney for Defendants John Tyberg, *alias* Edwin Johanson, ~~and John Sundback as Clerk of said Court.~~

Service admitted of copy foregoing this Oct. 9, 1913.

B. S. RODEY,
U. S. Atty.,
For John Sundback, Clerk of Court. [49]

In the District Court for the District of Alaska, Second Division.

No. 2425.

PIONEER MINING COMPANY, a Corporation,
Plaintiff,

vs.

JOHAN TYBERG, *alias* EDWIN JOHANSON, and JOHN SUNDBACK, as Clerk of Said Court,
Defendants.

Order [Enlarging Time to December 5, 1913, to File Record on Appeal, etc.]

On motion of G. J. Lomen, attorney for plaintiff above named, and good cause appearing to the Court therefor,

IT IS ORDERED that the time for filing and docketing the transcript on appeal of the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, in San Francisco, in the State of California, is hereby extended to and until the 5th day of December, 1913.

Done in open court this 9 day of October, 1913.

CORNELIUS D. MURANE,
District Judge.

Service of the foregoing order is hereby admitted, this 9th day of October, 1913. Also assignment of errors, petition for allowance of appeal, order allowing appeal, and undertaking.

GEORGE B. GRIGSBY,

Attorney for Defendant John Tyberg, *alias* Edwin Johanson.

B. S. RODEY,

U. S. Attorney,

For Defendant John Sundback, as Clerk of said Court. [51]

[Endorsed]: No. 2425. In the District Court, District of Alaska, Second Division. Pioneer Mining Company, a Corporation, Plaintiff, vs. Johan Tyberg et al., Defendants. Order Enlarging Time to December ——, 1913. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 9, 1913. John Sundback, Clerk. By J. A. B., Deputy. [52]

[Endorsed]: No. 2338. United States Circuit Court of Appeals for the Ninth Circuit. Pioneer Mining Company, a Corporation, Appellant, vs. Johan Tyberg, *alias* Edwin Johanson, and John Sundback, as Clerk of the District Court for the District of Alaska, Second Division, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Second Division.

Received October 27, 1913.

F. D. MONCKTON,
Clerk.

Filed November 5, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2338.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PIONEER MINING COMPANY, a corporation,

Appellant,

vs.

JOHAN TYBERG, alias EDWIN JOHANSON, and JOHN SUNDBACK, as Clerk of the District Court for the District of Alaska, Second Division,

Appellees.

BRIEF OF APPELLANT.

This is an action in equity instituted by the appellant as the owner of stolen properly—namely, gold dust, nuggets and amalgam, to have declared and enforced a trust in the proceeds of such gold dust, nuggets and amalgam, converted by the appellee, Johan Tyberg, the alleged thief, into cash in the sum of $5,345.02, and a draft drawn by the Union Savings and Trust Company on the First National Bank of Portland, Oregon, payable to said Tyberg under the *alias* Edwin Johanson, which cash and draft upon the

arrest of the appellee, Tyberg, was deposited with appellee, John Sundback, Clerk of the United States District Court of Alaska, Second Division, who caused the said draft to be converted into its face value, $9,000.00 in money, and holds the full amount of $14,345.02 subject to the order of the said Court.

The original bill was filed on the 28th day of October, 1912 (Tr., 3-7). Thereafter the Court sustained a demurrer (Tr., 12-13) thereto, to which its written opinion relates (Tr., 12-24), and an amended complaint being filed (Tr., 25) a demurrer thereto on the ground that it did not state facts sufficient (Tr., 31) was sustained (Tr., 33), the Court entering a judgment of dismissal of the bill (Tr., 33-4) without opinion, on August 18, 1913, and also on said day made an order denying the prayer for an injunction *pendente lite* and ordered that the preliminary restraining order theretofore made be dissolved. From said judgment and orders of the Court the appeal is prosecuted and appellant assigns the following errors, to wit:

SPECIFICATIONS OF ERROR.

1. The Court erred in sustaining the demurrer of the defendant, Johan Tyberg, to the original complaint in said action.

2. The Court erred in sustaining the demurrer to the amended complaint in said action.

3. The Court erred in granting defendant's motion dismissing plaintiff's complaint.

4. The Court erred in entering judgment dismissing plaintiff's complaint.

5. The Court erred in denying plaintiff's motion for an injunction *pendente lite.*

6. The Court erred in discharging the order to show cause why an injunction *pendente lite* should not be made.

7. The Court erred in discharging the restraining order granted in said order to show cause why an injunction should not be granted.

ARGUMENT.

The main question to be presented for the consideration of this Court was the error of the Court below in sustaining the general demurrer to the amended bill and in dismissing the same. All other errors must stand or fall upon what this Court holds relative thereto.

We will therefore proceed to examine the allegations of the bill as to their sufficiency to state a cause of action in equity.

It appears therefrom briefly that Tyberg was in the employ of the plaintiff in July, 1910, as foreman of the night shift—on the Winter Fraction Placer Claim in Nome, Alaska, belonging to plaintiff, and had the *custody* and *care* as the foreman and employee of the plaintiff of sluice boxes and gold-dust, nuggets and amalgam contained therein belonging to the plain-

tiff, it being his duty to protect and safeguard the same and not to remove the sluice boxes or permit their contents to be removed. That while so employed Tyberg wrongfully and unlawfully took and carried away from the said sluice boxes, gold dust, nuggets and amalgam of the value of fifteen thousand dollars, concealed the same and converted it to his own use; and in September of the same year, after retorting the amalgam, took it to the United States assay office in Seattle, State of Washington, and received a certificate representing its value in $14,345.02. That during said month Tyberg, alias Edwin Johanson, sold said certificate to the Union Savings & Trust Company at Seattle, receiving therefor $5,345.02 in cash and a draft on the First National Bank of Portland, Oregon, payable to Edwin Johanson or order, in $9,000.

That during the same month Tyberg was arrested by a deputy United States Marshal in Seattle for larceny in stealing the gold dust, amalgam and nuggets from the plaintiff, and the money and draft aforesaid being in his possession, were seized as the proceeds of the stolen property, and were transmitted to John Sundback, the Clerk of the United States District Court of Alaska, Second Division, who had the draft cashed and held the proceeds for and on account of the case of *United States* vs. *Tyberg,* then adjudicated.

That Tyberg *is insolvent* and not an inhabitant of Alaska; and that the only interest Sundback has is to hold the same for the benefit of the true owner sub-

ject to the orders of the Court. That Tyberg has demanded by oral motion to the Court that the said moneys be returned to him and unless he is restrained, will demand and claim the return to him of the proceeds of the said stolen gold dust, nuggets and amalgam held by Sundback.

That by reason of the foregoing, a constructive trust has attached to the said proceeds of the stolen gold dust, nuggets and amalgam and a lien should be declared on said proceeds in favor of the Pioneer Mining Company, and Tyberg should account to plaintiff in the sum of $14,345.02.

That the acts and threatened acts of Tyberg are in violation of plaintiff's rights and if the said moneys are paid to Tyberg, plaintiff will suffer irreparable loss and injury and any judgment rendered in favor of plaintiff would be ineffectual.

The prayer asks judgment for $14,345.02, that plaintiff be adjudged to have a specific lien on the proceeds of said stolen property in Sundback's hands to that extent less the Clerk's fees, and that the same be declared a trust fund. That pending the determination of the suit the said proceeds be placed in the registry of the Court and that in the meanwhile the defendant Tyberg, his attorneys, etc., be restrained from demanding or receiving the same.

These allegations state a cause of action in equity in that they show the existence of certain personal property belonging to the appellant; the fact that this property was in the care and custody of the defendant Tyberg under a trust to preserve and protect the same, its theft by Tyberg; its conversion of the same into other property traced directly into certain moneys and drafts found in his possession; his arrest for the theft; the taking of the property from him by the United States Marshal and the deposit of the same with the Clerk of the Court in the case of *United States* vs. *Tyberg,* being the criminal action instituted against him for the larceny; the adjudication of the said criminal action, the insolvency of Tyberg, the fact that Tyberg had made an oral motion to the Court to have the property turned over to him and that if the Court did not restrain him from receiving and the clerk from giving the property on deposit with him to Tyberg, Tyberg would regain possession of the property on deposit with the Clerk of the Court and we would be deprived of our property and any judgment rendered in the action would be ineffectual.

In maintaining the jurisdiction of the Court sitting in equity over the case presented by bill and that the same stated a cause of action, we contend:

Where property is obtained from another by fraud, either through the crime of larceny, or other more complex manner of theft, equity recognizes the ownership to be in him from whom it has been so fraudu-

lently obtained, and a court of equity will impress a trust upon the proceeds of such stolen property and the same may be reclaimed by the owner wherever they may be found in the hands of either a voluntary assignee, a depository, or in the possession of any one holding in bad faith.

In this case the holding of the Clerk must be treated as that of a depository for the true owner.

> "A constructive trust arises wherever another's property has been wrongfully appropriated and converted into a different form. If one person having money or any kind of property belonging to another in his hands, wrongfully uses it for the purchase of lands, taking the title in his own name, . . . or if an agent or a bailee wrongfully disposes of his principal's securities and with the proceeds thereof purchases other securities in his own name,—*in these and all similar cases equity impresses a constructive trust upon the new form or species of property not only while it is in the hands of the original wrong-doer, but as long as it can be followed and identified in whosoever hands it may come* except into those of a *bona fide* purchaser for value and without notice; and the Court will enforce the constructive trust for the benefit of the beneficial owner or original *cestui que trust* who has been thus defrauded. . . . Wherever one person has wrongfully taken the property of another and converted it into a new form, . . . *the trust arises and follows the proceeds.*"
>
> *Pomeroy's Eq. Jur.,* Sec. 1051, Vol. 3.

> "Whenever the legal title to property, real or personal, has been obtained through actual *fraud*

> . . . *concealments* . . . or through any other similar means, or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interests, equity impresses a constructive trust upon the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have any legal estate therein; *and a court of equity has jurisdiction to reach the property either in* the hands *of the original wrongdoer or in the hands of any subsequent holder* until the purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts which are termed *ex malefacio* or *ex delicto,* are practically without limit. . . ."

Id., Sec. 1053.
U. S. vs. *Carter,* 172 Fed., 1.
U. S. vs. *Carter,* 217 U. S., 49 (54 L. Ed., 769).

Under the facts disclosed by the bill, appellant had no remedy by motion or petition to the Court under the provisions of Sections 2374-8 of Chapter Thirty of the Code of Criminal Procedure, Compiled Laws of Alaska. An examination of Chapter Thirty (which is entitled "of the disposal of property stolen or embezzled") will disclose that it refers entirely to the *actual property* stolen, in specie, and that no provision is made for the return of the proceeds of the property in any such proceeding, even if as we believe, this bill might be treated as in the nature of such motion or petition.

The same reasoning would certainly apply against an action in replevin. And in view of the fact that we allege the *insolvency* of Tyberg, any other legal remedy would be fruitless and therefore inadequate.

> *Newton* vs. *Porter,* 69 N. Y., 133;
> *Aetna Indemnity Co.* vs. *Malone et al.,* 131 N. W., 200.

And in any event the legal remedy, if such there was, would not be exclusive.

See

> *Chavez* vs. *Meyer* (N. M.), 85 Pac., 233; 6 L. R. A. (N. S. 793 and note),

where suit was brought to impress a trust upon certain mortgage securities alleged to have been taken in exchange for moneys belonging to the plaintiff; the point was made that the suit could not be maintained because there was an adequate remedy at law. The Court said:

> "The character of the action is one peculiarly of equity cognizance as a part of the original chancery jurisdiction. The remedy by attachment or garnishment or both is not a common law one, but rests upon statute. *It is well settled that the fact that the statute may have given an additional remedy does not oust the courts of pre-existing inherent equity jurisdiction* affording the same result in the absence of words in the statute prohibitive of concurrent jurisdiction."

Citing

Pomeroy on Eq. Jur., Sec. 276.

See also,

Borchert vs. *Borchert,* 113 N. W. (Wis.), 35,

where the Supreme Court of Wisconsin said:

> "The point is made that the pleader intended to state a cause of action to establish a constructive trust and for an accounting, and that the facts alleged are not sufficient, in that it appears that the subject of the trust no longer exists, therefore only a personal action will lie. There are three answers to that proposition. One . . . Two: An action lies to establish a constructive trust and to recover the subject thereof *where the property wrongfully obtained in specie or in its converted form still remains in the possession of the wrongdoer;* Three: In case of a constructive trust, an action lies in equity for its establishment and for an accounting *even though the property wrongfully obtained is personal and in specie or in some new form in which it can be definitely traced, is within the reach of a plain remedy at law, where it is necessary in order to obtain complete justice for equity jurisdiction to deal with the situation."*

In its opinion rendered upon the demurrer to the original complaint the Court distinguished the case of *Aetna Indemnity Co.* vs. *Malone et al., supra,* from the case at bar by the fact that the thieves had been *convicted* and that the controversy was between other parties. The thieves were made defendants in the

suit, and whether or not they were convicted would be immaterial. So far as the complaint, either original or amended, is concerned in this case, nothing is shown as to whether or not Tyberg was convicted or acquitted. Both complaints are silent on that point and the fact one way or the other is not relevant upon the question of whether a constructive trust was shown under the allegations of the bill or whether such a bill may be maintained.

The English rule is stated by Lord Ellinborough as follows:

> "The law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be disposed of before the proper criminal tribunal in order that the justice of the country may be first satisfied in respect to the public offense and *after a verdict either of acquittal or conviction a civil action may be maintained.*"

Cooley on Torts, 3d Ed., Vol. 1, p. 151.

Says the Supreme Court of Florida in the case of *Williams* vs. *Dickenson,* 9 Southern, pp. 847-9:

> "In this country the doctrine of the suspension of the civil remedy in cases of felony has been repudiated by the great weight of the American authorities. Under the system of laws prevailing in the United States the reasons for this rule are entirely absent. Here we have a public officer whose duty it is to prosecute all offenders against the state without reliance upon the injured individual, and here we have no forfeiture of the felon's goods. The civil and the criminal prosecution may there-

fore go on *pari passu* or the one may precede or succeed the other; or, if the criminal prosecution is never commenced at all, the failure to seek public justice is no bar to the private remedy. *Neither is an acquittal or a conviction upon the criminal charge any bar to the civil action.*"

Citing

Pettingill vs. *Rideout,* 6 N. H., 454;
Blassingame vs. *Glaves,* 6 B. Mon., 38;
Railroad Corp. vs. *Davis,* 1 Gray, 83;
Howk vs. *Minnick,* 19 Ohio St., 462;
Newell vs. *Cowan,* 30 Miss., 492.

If then the offense against the dignity of the State need not first be disposed of, how can it be said that the question of either acquittal or conviction is pertinent in this case?

It must be borne in mind that we are not here dealing with the sufficiency of *proof* upon bill, answer and testimony to create a trust, but simply to determine whether or not the allegations of the bill as admitted by the demurrer, are sufficiently clear to set up a constructive trust in favor of the plaintiff in the proceeds of the stolen property, on deposit with the Clerk. And among the allegations necessarily admitted by the demurrer are those of the larceny by Tyberg of the gold dust, nuggets and amalgam and that the moneys in the Clerk's hands *are the proceeds* thereof, and that they belong to the appellant.

It would certainly seem that the essential facts are

sufficiently alleged to sustain a bill to establish a constructive trust in favor of the appellant, and if they can be sustained by proof will entitle it to the relief it seeks.

This would appear from the following cases, viz:

Chavez vs. *Meyer, supra;*
U. S. vs. *Carter,* 172 Fed., 1; *Id.,* 217 U. S., 54, L. Ed., 769;
Newton vs. *Porter,* 5 Lans., 416;
Newton vs. *Porter,* 69 N. Y., 133;
Lightfoot vs. *Davis,* 198 N. Y., 26; 29 L. R. A. (N. S.), 119;
Aetna, etc. Co. vs. *Malone,* 131 N. W., 200;
Jaafe vs. *Weld,* 139 N. Y. S., 1101;
Borchert vs. *Borchert, supra;*
Bishop vs. *Howe,* 117 N. Y. S., 976;
American Sugar Ref. Co. vs. *Fancher,* 145 N. Y., 552; 27 L. R. A., 757;
Holmes vs. *Gilman,* 20 L. R. A., 566;
Bosworth vs. *Allen,* 55 L. R. A., 751;
Nebraska Nat'l Bk. vs. *Johnson,* 71 N. W., 295.

The amended bill shows a trust relation between the plaintiff and defendant in that it appears that Tyberg had "the care and custody of said sluice boxes, gold dust, nuggets and amalgam therein," and it is further alleged that it was his duty "to protect and safeguard the same," and not to remove or permit to be removed therefrom the valuable contents of the sluice boxes.

The main reason given by the Court below in deciding against the original complaint was that no fiduciary relation was shown. In the amended complaint, however, this omission was supplied. But if the allegations of the bill were not sufficient to show any fiduciary relation to exist, they would still be sufficient to establish a constructive trust.

Nebraska National Bank vs. *Johnson, supra;*
Lightfoot vs. *Davis, supra;*
National Mahaiwe Bank vs. *Barry,* 125 Mass., 20;
Newton vs. *Porter, supra.*

In the case of *Nebraska National Bank* vs. *Johnson,* a man employed as the janitor of the bank and to watch over and guard to the best of his ability the property of the bank so far as such duties would allow, managed to appropriate from time to time moneys aggregating $5000 from the bank's moneys and purchased real property with the same. The action was brought to declare a trust in favor of the bank on the property purchased. The argument was made that equity did not have jurisdiction because no fiduciary relationship was shown to exist. Upon this point the Court say: (We quote at some length.)

> "The other questions discussed are (1) whether the relation of the parties towards each other was a fiduciary one, in the sense in which that term is understood and employed by courts of equity; (2) whether, *assuming, as claimed that the evidence*

fails to establish any such relation of trust and confidence, will equity interfere for the purpose of declaring in favor of the injured party a trust with respect to property purchased by a thief with the fruits of his larceny?

"It has been held that no trust results in favor of the owner with respect to the proceeds of property stolen by a mere servant, and that the master is in such case restricted in his remedy to an action for damage, and to a prosecution of the thief in a court of criminal jurisdiction. A review of the cases tending to support that view will not be attempted in this connection. *It is sufficient that the doctrine therein assailed is in our judgment indefensible on authority, and opposed to the enlightened policy of modern equity jurisprudence. The doctrine of constructive trusts as developed by courts of equity, was intended primarily as a remedy for fraud in cases where the established rules had proved wholly inadequate; and larceny under the circumstances herewith disclosed, is none the less a fraud upon the owner of the property stolen, because committed by a servant instead of one who is, in the technical sense of the term, a trustee.*"

And referring to 1 *Beach. Mod. Eq. Jur.,* Sec. 226, the Court further says:

"Speaking on that subject, it is said in a recent valuable work, that 'the subject of constructive trusts is intimately connected with that of frauds. Indeed *the basis of all such trusts is fraud,* either actual or presumed. Rightly understood a constructive trust is only a mode by which courts of equity work out equity, and prevent or circumvent fraud and over-reaching.' "

The opinion of the Court in the very late case (1911) of

Aetna Indemnity Co. vs. *Malone, supra,*

reaffirms this principle, citing the foregoing case.

This was a suit to enjoin the Chief of Police and a police officer from transferring money taken by them from burglars who had stolen it from a bank, on the ground that the plaintiff had indemnified the bank against burglary, had paid the indemnity and had succeeded to the rights of the bank.

The police officers and burglars were made defendants and judgment for full amount stolen was prayed for and obtained.

The Court said:

> "The main purpose of the litigation as shown by the petition was to trace the stolen fund through the burglars into the hands of the police officers and restore it to the owner. *It is alleged that the burglars are insolvent* (as here). *The recovery of a judgment against them was consequently a secondary matter.* They had in their possession only a portion of the amount stolen when searched, and as to that plaintiff was seeking redress by enjoining the policemen from transferring it to others, and by establishing a constructive trust.
>
> "In the petition there was no attempt to describe the particular denominations of the money taken from the bank or found in the hands of the burglars or the police officers. There had been opportunity to change the currency into different items. *Defendants were no less accountable because their possession grew out of a felony. Confidential rela-*

tions are not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to stolen property. It may be traced through the thief into a different form of property and restored to the beneficial owner. In contriving means to cheat an owner out of his property a thief should not be permitted to outstrip the courts in discovering a remedy to restore it when found."

The case of *Newton* vs. *Porter,* 5 Lans. (N. Y.), 416, was an equitable suit to compel an accounting of the proceeds of certain stolen bonds acquired by the defendants with notice of the plaintiff's rights and in which the Court subjected the securities in which they invested the money to a charge in favor of the owner of the stolen bonds.

In reversing the decision of the lower Court dismissing the complaint, it was said:

"No exception is made in favor of a person who occupies no fiduciary relation to another *and the elementary books generally do not notice any exception from the rule where the money or property has been obtained by means of a felony. It would certainly be an anomaly in the history of legal proceedings and a grave reflection upon the administration of justice, if a felon could invest the fruits of his crime or dispose of them in such a manner as to place them* beyond the reach of the law."

"The Court should not refuse to allow a party to recover the avails of property stolen from him *on any technical grounds* when the merits of the case clearly require that he should recover *and the Court should jump all the technicalities* and be as astute in discovering a remedy for upholding the

rights of such a party as the thief is in contriving ways and means to cheat him out of his property and the avails of it by changing the same from one kind to another, and placing it in the hands of third persons."

The Court of Appeals in upholding this decision emphatically says:

"It is insisted by counsel for the defendants that the doctrine which subjects property acquired by the fraudulent misuse of trust moneys by a trustee to the influence of the trust, and converts it into trust property, and the wrongdoer into a trustee at the election of the beneficiary, has no application to a case where money or property acquired by *felony* has been converted into other property. There is, it is said, in such cases, no trust relations between the owner of the stolen property and the thief, and the law will not imply one for the purpose of subjecting the avails of the stolen property to the claim of the owner. *It would seem to be an anomaly in the law, if the owner has been deprived of his property by a larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it, or the property into which it has been converted, than one, who by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possesion of the trust property has been confided. The law in such a case will raise a trust in invitum out of the transaction for the very purpose of subjecting the substituted property to the purposes of indemnity and recompense.*"

Newton vs. *Porter,* 69 N. Y., 133.

In the case of *American Refinery Co.* vs. *Fancher, supra,* the principle of *Newton* vs. *Porter,* is affirmed

by the New York Court of Appeals where it says (citing the latter case):

> "The jurisdiction of a court of equity to *follow the proceeds of property taken from the true owner by felony . . . and converted into property of another description* and to permit the true owner to take the property in its altered state as his own . . . so long as the rights of *bona fide* purchasers do not intervene, has been frequently exerted and is a jurisdiction founded upon the plainest principles of reason and justice."

And says further:

> "In the cases of *stolen property* or of misapplication by a trustee or agent of the funds of the principal or *cestui que* trust, the title of the real owner of the property has been in most cases lost, without his consent, and the Court *by a species of equitable substitution repairs as far as practicable, the wrong and prevents the wrongdoer from profiting by his fraud.*"

In the still later case of

Lightfoot vs. *Davis, supra,*

the same Court reiterates, in a well considered opinion, the principle that equity has jurisdiction of a suit to reach the proceeds of property which a thief has turned into cash, declaring that he holds them in trust for the true owner, saying:

> "The method by which equity proceeds in all these cases is to turn the wrongdoer into a trustee."

and says that cases of that character

> "are to be distinguished from that large class, often that of principal and agent, in which it is held that an accounting in equity will not lie, and that the accounting must be had in an action at law. In such cases there exists merely a debt from one party to another, while in those of the former class, *the property or fund itself belonging to the claimant, he is entitled to follow the proceeds as long as he may be able to identify them, or failing that, to recover not only the amount of the fund but also any profit acquired by its wrongful appropriation.*"

The allegations of the amended bill deemed admitted by the demurrer, bring this case within the rule of the foregoing authorities. Certainly they are sufficient to show for the purposes of the demurrer that the stolen property was converted into the funds in the possession of the Clerk. And the only limitation to the rule laid down in the text-books and decisions that equity will impress a trust upon property wrongfully appropriated *wherever it may be found* so long as it may be identified in its original or any new form into which it has been converted by the wrongdoer, is where it has passed into the hands of a *bona fide* purchaser for value and without notice.

Take the bill as a whole, and under the principles discussed in the cases cited, how can there be any doubt as to the allegations being adequate to bring the case within the beneficial and far-reaching doctrine of constructive trusts by which a court of equity both pre-

vents and punishes fraud by taking from the wrongdoer the fruits of his wrongdoing and where, as here, his insolvency is admitted, leaving no adequate remedy at law? At least they are sufficient to entitle plaintiff to its day in court and to preserve the *res* pending such day.

If the bill states a cause of action in equity, then the appellant was entitled to further invoke the equitable powers of the Court to *preserve* the property in *statu quo* pending a determination of the questions involved and its restraining order *pendente lite* was an order rightfully made and should have been allowed to stand. The right to the injunctional order was necessarily dependent upon the right to maintain the action. If the Court was correct in its ruling on the demurrer, the injunctional order falls as of course. If the Court was, as we believe and assert, entirely wrong in its conclusions, its decision should be reversed and the injunctional order re-instated *pendente lite.*

O. D. COCHRAN,
G. J. LOMEN,
Attorneys for Appellant.

METSON, DREW, MACKENZIE
and E. H. RYAN,
of Counsel.

United States

Circuit Court of Appeals

For The Ninth Circuit

PIONEER MINING CO., Appellant, vs. JOHAN TIBERG and JOHN SUNDBACK, as clerk, Appellees.	No. 2338

BRIEF OF APPELLEE JOHAN TIBERG ON MOTIONS

The appellee, Johan Tiberg, has pending six motions which have been continued by the court, as well as noticed by the appellee, for hearing on the date fixed by the court for regular hearing on this appeal. For convenience, we present the

argument on each one of these motions under the same cover as the brief on the merits. In doing so, we specifically reserve all rights under these motions and do not waive the motions or any of them.

I.

MOTION TO DISMISS APPEAL.

The first motion is a motion to dismiss the appeal and has three subdivisions; (a) that no appeal in this case lies except to the Supreme Court of the United States, and this court is without jurisdiction in the premises; (b) that the transcript in this case is not properly certified; (c) that the record before the court shows an attempt to review an order and the evidence used at the hearing in the lower court is not included in the record brought to this court. We argue each of these subdivisions separately.

(a) *The appeal in this case should have been to the Supreme Court of the United States.*

This court held in *Shields v. Mongollon Exploration Co.,* 70 C. C. A. 123, that Alaskan appeals are governed by the civil code for Alaska, saying:

> "But the appellate jurisdiction of this court over appeals and writs of error from the Dis-

trict Courts of Alaska is not ruled by the act of April 7, 1874, but by Chapter 51 of the act of June 6, 1900, providing a civil code for Alaska (31 Stat. 414)."

Of course at the present time, the appellate jurisdiction is ruled by the act of March 4, 1911, 36 Stat. L. Secs. 1134 and 1158. These sections are given as Sections 1336 and 1337 of the "Compiled Laws of the Territory of Alaska." So far as applicable, these sections read:

"Section 1336. Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the District Court for the District of Alaska or for any division thereof, direct to the Supreme Court of the United States, in the following cases: * * * in *all* cases which involve the construction or application of the Constitution of the United States, * * *.

"Section 1337. In all cases *other* than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in Section thirteen hundred and thirty-six, * * * writs of error and appeals shall be from the District Court for Alaska or from any division thereof, to the Circuit Court of Appeals for the Ninth Circuit * * *."

any possible argument it could be applicable, reads:

> "That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases: * * * (4) in any case that involves the construction or application of the Constitution of the United States. * * *."

The general intention of the act of March 3, 1891, was to distribute the appellate jurisdiction and to permit an appeal to only one court. In *Robinson v. Caldwell,* 165 U. S. 359, 41 L. Ed. 745, the court said:

> "It was not the purpose of the judiciary act of 1891 to give a party who was defeated in the Circuit Court of the United States the right to have the case finally determined upon its merits both in this court and in the Circuit Court of Appeals."

See also, *Carter v. Roberts,* 117 U. S. 496, 44 L. Ed. 861;

Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 46 L. Ed. 546;

C. H. & D. R. Co. v. Thiebaud, 177 U. S. 615, 44 L. Ed. 911;

Loeb v. Trustees of Columbia Township, 179 U. S. 472, 45 L. Ed. 280.

Where a case is controlled by the construction or application of the Constitution, an appeal lies direct to the Supreme Court. In *C. H. &D. R. Co. v. Thiebaud,* 177 U. S. 615, 44 L. Ed. 911, the court said:

> "In *Carter v. Roberts,* 177 U. S. 496, it was held that when cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court."

It is settled law that an appeal lies to the Supreme Court even though the constitutional question involved is not the sole question on the appeal.

Hastings v. Ames, 15 C. C. A. 628.

Where the record shows that the case really and substantially involves the application or construction of the Constitution, the jurisdiction of the United States Supreme Court is exclusive. In *American Sugar Refining Co. v. New Orleans,* 181 U. S. 277, 45 L. Ed. 859, the court said:

> "As, however, a case so arises where it appears on the record, from plaintiff's own statement, in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution or some law or treaty of the

United States, (*Little York Gold Washing & Water Co. v. Keyes,* 96 U. S. 199, 24 L. Ed. 656; *Blackburn v. Portland Gold Min. Co.,* 175 U. S. 571, 44 L. Ed. 276, 20 Sup. Ct. Rep. 222; *Western U. Teleg. Co. v. Ann Arbor R. Co.,* 178 U. S. 239, 44 L. Ed. 1052, 20 Sup. Ct. Rep. 867), and as those cases fall strictly within the terms of Section 5, the appellate jurisdiction of this court in respect to them is exclusive."

In *Union & Planter's Bank v. Memphis,* 189 U. S. 71, 47 L. Ed. 712, the court said:

"Diversity of citizenship did not exist, and the jurisdiction of the Circuit Court rested solely on the ground that the cause of action arose under the Constitution of the United States. The appeal lay directly to this court under Sec. 5 of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547, and not to the circuit court of appeals. *American Sugar Ref. Co. v. New Orleans,* 181 U. S. 277, 45 L. Ed. 859, 21 Sup. Ct. Rep. 646. Nevertheless, an appeal having been prosecuted to the latter court, and having there gone to decree, an appeal was allowed to this court because the judgment was not made final in that court by Sec. 6 of the act. But because the case being here, and the jurisdiction of the circuit court having depended on the sole ground that it arose under the Constitution, we

are constrained to reverse the decree of the circuit court of appeals, not on the merits, but by reason of the want of jurisdiction in that court. If this were not so, the right to two appeals would exist in every similar case, notwithstanding, as we have repeatedly held, that such was not the intention of the act." (Citing cases).

See also *Filhiol v. Maurice,* 185 U. S. 108, 46 L. Ed. 827.

The record in this case does show, within the language of the *American Sugar Refining Co.* case, *supra,* that the appellant's complaint really and substantially raises a question concerning the application and construction of the Constitution of the United States; that this question, while not the only one in the case, is controlling and the judge of the District Court based his opinion largely on that question. This case is not within the line of decisions in which it has been held that where the jurisdiction of the lower court depended entirely on a diversity of citizenship, and there was also involved a question of the construction or application of the Constitution, an appeal would lie to this court. The case is within the ruling of the *Union & Planters Bank* case, *supra,* in which the Supreme Court reversed the case and ordered its dismissal by the Circuit Court of Appeals for the reason that the Circuit Court of Appeals had no jurisdiction.

(b) *The transcript in this case is not properly certified.*

The certificate (R. 50) reads:

> "I, John Sundback, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 46, both inclusive, are a true and exact transcript of the Summons, Complaint, Motion for Injunction *Pendente Lite,* Affidavit in support of Motion, Order to Show Cause and Temporary Restraining Order, Demurrer, Court Minutes of June 28, 1913 (Sustaining Demurrer, etc.), Opinion, Amended Complaint, Demurrer to Amended Complaint, Court Minutes of August 9, 1913 (Sustaining Demurrer, etc.), Judgment, Court Minutes of August 18, 1913 (Denying Injunction Pendente Lite, etc.), Bill of Exceptions, Assignment of Errors, Petition for Allowance of Appeal, Order Allowing Appeal and Fixing Amount of Bond, Undertaking on Appeal, and Praecipe for Transcript on Appeal, in the case of Pioneer Mining Company, a Corporation, Plaintiff, vs. Johan Tiberg et al., Defendants, No. 2425—Civil, this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska."

Under that certificate, the transcript is nothing more nor less than *a bundle of certified copies* of papers appearing among the files in the office of the

Clerk of the District Court. Sections 698, 750 and 997 R. S. and Rule 14 of this court, require an authenticated transcript of the record, so far as the same may be necessary on the hearing of the appeal. Section 750 designates what shall constitute the record in the District Court. Section 698 directs that upon an appeal, in addition to the entire record as defined in Sec. 750, the transcript must contain "copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal." Sec. 997 makes the filing of an authenticated transcript as required by Sec. 698 a part of the procedure on appeal necessary to give this court jurisdiction. Rule 14 of this court, in sub-divisions 1 and 3, provides:

> "The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, opinion or opinions of the court, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court. * * * No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court shall be filed."

The complaint in this case attempts to state a cause of action for an injunction (R. 3 to 6 and 25 to 30). At the time the action was commenced,

a temporary restraining order and order to show cause was obtained which was based, as the order recites, upon an affidavit (R. 10, 11). A hearing was subsequently had upon this order to show cause, at which time, according to the printed record, there was produced on the hearing a further affidavit by Louis Stevenson and a deposition by Johan Tiberg, after which the order to show cause was submitted to the court on the record then before it which necessarily included *first,* the affidavit filed at the time the order to show cause was issued, *second,* the affidavit of Louis Stevenson filed at the hearing, and *third,* the deposition of Johan Tiberg published at the hearing; and on the record as then made up, the court denied the injunction *pendente lite* and dissolved the restraining order (R. 35). In addition to what the printed record shows, there was served and filed prior to the hearing, and used on such hearing, and considered by the court in making the order appearing in the record on page 35, affidavits on behalf of the appellee by Johan Tiberg and George Grigsby. (See affidavits of O. L. Willett and Johan Tiberg in support of the motions). This appellee demurred to the amended complaint, which demurrer was sustained and following which the appellant having refused to plead further, the final judgment of dismissal was entered. (R. 31 to 34).

The appellant appealed, as shown by its petition for the allowance of an appeal, "from said final judgment and from the whole and every part thereof, and from the said order refusing and denying to plaintiff the said injunction *pendente lite,* and from the said order discharging said order to show cause, and from the said order discharging the said restraining order." (R. 41). In its bill of exceptions, it also excepted to the order dissolving the restraining order and denying the injunction *pendente lite.* (R. 37). In its assignment of errors, it assigns *inter alia*;"5. The court erred in denying plaintiff's motion for an injunction *pendente lite.* 6. The court erred in discharging the order to show cause why an injunction *pendente lite* should not be made. 7. The court erred in discharging the restraining order granted in said order to show cause why an injunction should not be granted." (R. 39, 40). In other words, this appeal involves four things. *First,* the ruling of the court discharging the order to show cause. *Second,* the ruling of the court discharging the restraining order. *Third,* the ruling of the court denying the injunction *pendente lite. Fourth,* the final judgment entered by the court. Three of these four questions, that is 75 per cent of this appeal, cannot be passed upon by this court without the proofs on which the district judge made his rulings. Those proofs are necessary to the hearing of this appeal. The record itself, without the affidavits filed here on

behalf of appellee, shows that proofs were submitted to the district judge and yet *none of the proofs* is included in the transcript, and the certificate of the clerk fails even to show that he has sent up all of that which is strictly the record in the district court as defined in Sec. 750.

The procedure and practice on appeals from Alaskan courts are the same as from U. S. District Courts. Sec. 1340 Compiled Laws of Alaska, 31 Stat. L. 415. Therefore the law, whatever it is, requiring the filing of an authenticated transcript on an appeal from the U. S. District Court to this court by or before the return day applies here.

That law (Sections 997 and 698 R. S.) makes the filing of an authenticated transcript a jurisdictional prerequisite. Sec. 11 of the act of March 3, 1891, 26 Stat. L. 829, makes all of the provisions of law in force at that time regulating the methods and system of review through appeals or writs of error to the Supreme Court of the United States apply to the circuit courts of appeal, and therefore, the jurisdictional prerequisite as to filing an authenticated transcript in this court is the same as in the Supreme Court.

By Sec. 1012 R. S., appeals are made subject to the same rules, regulations and restrictions as are prescribed by law in cases of writs of error, which makes Sec. 997 applicable here.

In *Edmonson v. Bloomshire,* 7 Wall. 306, 19 L. Ed. 91, the Supreme Court held that the filing of a record as required by law is jurisdictional; and in *Idaho etc. Co. v. Bradbury,* 132 U. S. 509, 33 L. Ed. 433, the court said:

> "In order to give this court jurisdiction of an appeal or writ of error 'an authenticated transcript of the record' of the court below must doubtless be filed in this court at the return term."

In *Grigsby v. Purcell,* 96 U. S. 505, 25 L. Ed. 354, referring to Sections 997 and 1012 R. S., the court said:

> "Under this legislation it has long been held that if the transcript was not filed and the cause docketed during the term to which it was made returnable, or some sufficient excuse given for the delay, the writ of error or appeal became inoperative, and the cause might, on that account, be dismissed."

See also *Carrol v. Dorsey,* 20 How. 204, 15 L. Ed. 803; *Hill v. Railroad Co.* 129 U. S. 170, 32 L. Ed. 651; *Nashua & L. R. Corp. v. Boston & L. R. Corp.,* 9 C. C. A., 468. A transcript not "properly authenticated" is simply no transcript at all and the filing of any such a transcript amounts to no more than if there had been no transcript filed. An appeal becomes void and must be dismissed where the record is not filed according to law.

Castro v. U. S., 3 Wall. 46, 18 L. Ed. 163; *The Virginia v. West,* 19 How. 182, 15 L. Ed. 594; *The Lucy v. U. S.,* 8 Wall. 307, 19 L. Ed. 394; *Mesa v. U. S.,* 2 Black 721, 17 L. Ed. 350; *Caillot v. Deetken,* 113 U. S. 215, 28 L. Ed. 983. In the last cited case, the court said:

> "It has been repeatedly decided by this court that where no return has been made to a writ of error by filing the transcript of the record here, either before or during the term of the court next succeeding the filing of the writ in a circuit court, this court has acquired no jurisdiction of the case, and the writ having then expired, can acquire none under that writ, and it must, therefore, be dismissed." (citing cases).

The jurisdiction of the court over an appeal is not complete until a proper transcript has been filed. 4 Enc. L. & P. 205. The responsibility is on the appellant to furnish a complete record properly authenticated. 4 Enc. L. & P. 206. The jurisdiction of the court must appear in the record. *In Re Smith,* 94 U. S. 455, 24 L. Ed. 165, the court said:

> "The facts upon which the jurisdiction of the courts of the United States rests must, in some form, appear in the record of all suits prosecuted before them. To this rule there are no exceptions."

This court gets jurisdiction on appeal only on the filing of a "properly authenticated record," which under Sections 698, 750 and 997 R. S. must contain and be shown by the certificate of the clerk to contain the entire record in the lower court as defined by Sec. 750 and so much of the other proofs, entries and papers on file as may be necessary on the hearing of the appeal. In the absence of a *prima facie* showing in the clerk's certificate that the transcript does comply with these requisites, the record does not show jurisdiction.

If jurisdiction does not affirmatively appear on the face of the record, the court must dismiss the appeal. As was said in *Parker v. Ormsby,* 141 U. S. 81, 35 L. Ed. 654:

> "In the exercise of its power, this court, of its own motion, must deny the jurisdiction of the courts of the United States, in all cases coming before it, upon writ of error or appeal, where such jurisdiction does not affirmatively appear in the record on which it is called to act."

The certificate of the clerk in this case does not purport in any way to show whether or not the transcript sent to this court contains the complete or even any part of the record, of the lower court as defined by Sec. 750. Neither court nor counsel can say from the clerk's certificate or the record

now in this court either that this bundle of certified copies constitutes any part of the record below or that there are not other parts of the record of the lower court that have not been brought to this court. The certificate is also silent as to whether or not the transcript sent to this court contains all, or any part of, the proofs, entries and other papers as required by Sec. 698 R. S.. On the contrary, the body of the transcript itself shows that *it does not contain all such instruments.* The clerk's certificate is also lacking in anything to excuse his failure to include the entire record or the entire proofs, entries and papers. In other words, this record is not properly authenticated and not being properly authenticated, it cannot be considered by this court as a record. In the case of *Ray v. Law,* 3 Cranch 179, 2 L. Ed. 404, a record not properly authenticated was produced before the court. Chief Justice Marshall said:

> "The act of Congress points out the mode in which we are to exercise our appellate jurisdiction, and only authorizes an appeal or writ of error on a final judgment or decree. * * * We can do nothing without seeing the record, and the papers offered cannot be considered by us as a record."

This decision is applicable here because the statute (26 Stat. L. 829) makes the method and system of carrying cases to the Supreme Court applicable to this court.

In *Meyer v. Mansur,* 29 C. C. A. 465, the court dismissed an appeal in which the certificate was almost identical with the one in the present record.

In *Cutting v. Tavares,* 9 C. C. A. 401, the court held that a certificate reading "that the foregoing papers, numbered from 1 to 200, inclusive, is a true, full, and complete transcript of so much of the said record, papers, exhibits and proceedings in the said cause of ..... as now appears and is of file and of record in my office; said transcript being true and correct copies of the originals of the several papers, proceedings, depositions, files and orders therein contained as they are now of file and of record in my office" was insufficient. That was a much stronger and more complete certificate than the one in this case.

In *Ruby v. Atkinson,* 35 C. C. A. 458, a somewhat similar certificate was held insufficient.

In *Campbell v. Reed,* 2 Wall. 198, 17 L. Ed. 779, Chief Justice Chase said:

> "The record before us shows no certificate that the papers contained in it are a true and correct transcript of the proceedings in the circuit court; *the appeal must, therefore, be dismissed.*"

To summarize, Sec. 997 R. S. in the light of Sec. 1012 R. S. makes "an authenticated transcript of the record" a jurisdictional prerequisite. Sec.

750 R. S. specifies what shall constitute the record in the district court. Sec. 698 R. S. makes it mandatory that a transcript of the entire record as defined in Sec. 750 shall be sent up on an appeal, and in addition thereto, so much of the other proofs, entries and papers as may be necessary on the hearing of the appeal. There is no discretion as to the sending up of the record. In this case there is nothing to show that the entire record has been sent to this court and the transcript affirmatively shows that all of the proofs, entries and papers necessary on the hearing have not been transmitted. Moreover, the certificate of the clerk fails to show that any of the papers included in the transcript were ever called to the attention of the judge or used by him in any way. They are in no way identified with the action of the trial court. The transcript here is simply a bundle of certified copies and the appeal should be dismissed.

(c) *The record shows that the appellant seeks to review an order discharging the order to show cause, dissolving the restraining order and denying a temporary injunction without bringing to this court any part of the evidence on which the District Judge based his order.*

Sub-division 3 of rule 14 of this court requires a complete record so far as necessary to a hearing here. Insofar as three out of the four questions sought to be reviewed are concerned, there is not

only no "complete record" in this court, but there is absolutely no record at all. The record in this case as now made up, impeaches the good faith of the solicitors who are responsible for the condition of the record as sent here. The record shows that this suit was brought to prevent the paying over to the appellee, Johan Tiberg, of certain money in the possession of the clerk of the District Court, which money was taken from the said Tiberg at the time of his arrest on a criminal charge and to be held for use as evidence in the case. The District Judge not only denied, on evidence submitted to him, a temporary injunction, but he also sustained a demurrer to the complaint. Without such an injunction kept in force, the clerk of the lower court would be required to pay over to Tiberg the money that was taken from him. The appellant evidently, from the record, merely wants a review of the order of the lower court sustaining the demurrer, but it seeks by a pretended appeal from the orders respecting the order to show cause, restraining order and temporary injunction, to maintain the *status quo*. The only way that they could maintain the *status quo* was by appealing from the orders respecting the order to show cause, restraining order and temporary injunction and thereon get a supersedeas, the effect of which is to continue a temporary restraining order in force. At the same time, the appellant, in order to have any opportunity of

winning in this court, was under the necessity of preventing this court from getting before it as a part of the record the fact that Tiberg had been tried on the criminal charge in connection with which the money in question was forcibly removed from his person by the officers at the time of his arrest, and that on such trial he had been acquitted and discharged. Had the appellant brought to this court the evidence on which the District Judge acted, it would then have appeared from the record that Tiberg had been acquitted and that there never had been any possible trust relationship between the appellant and Tiberg. In other words, the appellant seeks the benefit of an appeal to this court from the order dissolving the restraining order and at the same time seeks to prevent this court from knowing at least one of the facts on which the order appealed from was made, to-wit; that Tiberg had been acquitted. We are convinced that the appeal, insofar as it concerns the order to show cause, restraining order and temporary injunction, is not in good faith. Certainly this court cannot review and the opposing counsel must have known that you could not review the orders of the District Judge in these particulars without having the evidence on which the District Judge acted. They have brought to this court a record that on the face of it is incomplete and is no record at all insofar as 75 per cent of the appeal is concerned. Moreover, insofar as the

record shows, it may not be even the complete or any part of the record as to the other 25 per cent of the appeal. There is absolutely nothing in the record or the certificate of the clerk to show that the transcript is a copy of the whole or any part of the record in the lower court in any particular or on any point. The clerk has simply certified that he has sent to this court correct copies of certain specified papers on file in his office. Much of what we have said in sub-division "b" of our argument on this motion applies equally to this sub-division.

In *Keene v. Whitaker,* 13 Pet. 459, 10 L. Ed. 246, a case was taken to the Supreme Court on an agreed statement of facts without any of the proceedings in the court being in the record. Among other things, the court said:

> "It cannot appear, therefore, that this court has jurisdiction of the case; which is essential before it can give its judgment in any cause * * * The 31st rule is: 'No cause will hereafter be heard until a complete record, containing in itself, without references *aliunde,* all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing, shall be filed.' The court orders this case to be dismissed."

The *Keene* case was cited and followed in *Curtis v. Petitpain,* 18 How. 109, 15 L. Ed. 280, and that case was dismissed for the same reason.

In *Redfield v. Parks,* 130 U. S. 623, 32 L. Ed. 1053, the court said:

> "The transcript of the record was filed in this court on April 5, 1886. The certificate of the clerk of the circuit court to the transcript is dated March 8, 1886, and does not comply with Rule 8, sub-division 1, for it only certifies 'that the foregoing writing, annexed to this certificate, is a true, correct, and compared copy of the original remaining of record in my office.' It does not say, as required by the rule, that the annexed papers are 'a true copy of the record, and of the assignment of errors, and of all proceedings in the case.' It is quite apparent that there are papers of record in the court below, a copy of which ought to form part of the transcript. The complaint and answers are necessary to the hearing in this court, and unless a record containing them is filed here the case cannot be heard.
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> As was said in *Union Pac. R. Co. v. Stewart,* 95 U. S. 279, 284, it is the duty of the party who takes a writ of error 'to see to it that the record is properly presented here.' "

In *Meyer v. Mansur,* 29 C. C. A. 465, the clerk's certificate was in effect precisely what the certificate is in this case. The appellees moved to dismiss the case, *first,* because the transcript was not properly authenticated, and *second,* because the record was not filed in time. The court said, *inter alia:*

> "Addressing ourselves to the first ground of objection urged by the appellees, it seems clear that this court has no legal transcript before it. The clerk has certified the copies of 18 documents which were filed in the cause below, but the clerk's certificate does not go beyond attesting to the correctness of those copies, and the certificate shows in no manner that those 18 documents constitute the entire transcript of proceedings in the cause. A comparison between the clerk's certificate in this cause and the usual clerk's certificate authenticating a full transcript will show at once the plain defect in the certificate before the court. It must be borne in mind that in this case there is neither a certificate of the clerk attesting a full transcript, nor a stipulation of parties as to what documents shall constitute the necessary transcript, nor a statement by the clerk that he was guided by the appellant's solicitor in the selection of the papers necessary to constitute the transcript.

In *Hill v. Railroad Co.,* 129 U. S. 174, 9 Sup. Ct. 270, the supreme court said:

'It is well settled by the decisions of this court that it has no jurisdiction of an appeal unless the transcript of the record is filed here at the next term after the taking of the appeal.'

Also see *Blitz v. Brown,* 7 Wall. 694.

This court, in order to maintain an appeal upon its docket, must have at least *prima facie* proof that it has a lawful transcript before it. * * Where a transcript *prima facie* lawful is before the court—as in the case above cited of *Nashua & L. R. Corp. v. Boston & L. R. Corp.,* a motion to dismiss the appeal will not be entertained, and the dissatisfied party must resort to the writ of certiorari. But when, as in the case before us, not even a *prima facie* transcript has been filed in this court, the proper action is to dismiss the appeal. Where the clerk certified to a full transcript, and it was urged that the transcript was incomplete, the supreme court held that the transcript was *prima facie* lawful, and that the deficiencies, if any, might be supplied by certiorari. The *Rio Grande,* 19 Wall. 188. Where the clerk had not appended his certificate to the transcript, the supreme court held that the remedy was not by certiorari. *Hodges v. Vaughan,* 19 Wall. 12. Rule fourteen, Sec. 3 (21 C. C. A. cxvi, 78 Fed. cxvi) of this court provides that:

'No case will be heard until a complete record, containing in itself and not by reference all the papers, exhibits, depositions and other proceedings which are necessary to the hearing in this court, shall be filed.'

See *Keene v. Whitaker,* 13 Pet. 459.

"In the case at bar the clerk's certificate merely authenticates certain papers as being correct copies of their originals on file in the clerk's office. We have been referred to no case, nor has our investigation discovered one, which would warrant us in holding that there is in this cause even a *prima facie* showing that the lawful transcript is before us. The appeal must be dismissed."

This is not a case where the record on its face is complete or where the certificate of the clerk is fair on its face. If that were the fact and the appellee was questioning the correctness of the certificate of the clerk to the effect that he had sent here the full record and so much of the other proofs, papers and entries as he had been directed to send by appellant's solicitors, then the appellee's only remedy would be to ask for *certiorari*; because a record that is *prima facie* complete and lawful gives this court jurisdiction. In the present case, however, this court cannot acquire jurisdiction of the appeal because the certificate of the clerk is not *prima facie* correct and the record on its

face shows that it is not complete. There is nothing to show that the whole or any part of the record in the District Court as defined by Sec. 750 R. S. is before this court, and the record affirmatively shows that depositions and affidavits necessary to a hearing of three out of the four questions raised are not here. Moreover, the record affirmatively shows that this is not a case where a part of the evidence has been brought to this court, but that it is a case where none has been brought.

As applied to this entire first motion with its three sub-divisions, we quote to the court from Simkins Fed. Equity Suit (2 ed.) p. 735 *et seq:*

> "Sec. 997, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 712, requires an authentic transcript of the record, and Rule 8 of the Supreme Court rules and rule 14 * * * of the C. C. A., requires a true copy of the record, assignment of errors, and all proceedings in the case under the hand of the clerk and seal of the court to be transmitted to the appellate court. * * * The certificate must show that the transcript is complete and not simply that the matters contained in the transcript are correct copies, * * * or it must show that the record as sent up was designated by the stipulations of counsel, or that the clerk was guided by appellant's counsel in preparing the transcript, and selecting the papers necessary to a hearing * * *

Form of Certificate.

I, W. R., Clerk of the Circuit Court of the United States for the ..... District of ....., in the ..... Circuit, do hereby certify that the above and foregoing is a true, full, correct and complete transcript of the record, assignment of errors and all proceedings had in cause No. ..... equity, wherein A. B. is complainant and C. D. is defendant, as fully as the same remains on file and of record in my office at .....

If part of the proceedings are omitted by the direction of counsel it may be stated thus: That the foregoing is a true copy of the record, assignments of error and proceedings, except that certain portions thereof are omitted by direction of appellant's counsel, the omitted portions being (designate what was omitted), etc."

II.

ALTERNATIVE MOTION TO DISMISS APPEAL FROM ORDER DISCHARGING ORDER TO SHOW CAUSE, DISSOLVING RESTRAINING ORDER AND DENYING INJUNCTION PENDENTE LITE.

The second motion is in the alternative. If the court does not grant the motion to dismiss the entire appeal, then this appellee asks the court

to dismiss so much of the appeal as pertains to the 5th, 6th and 7th assignments of error as given on pp. 39 and 40 of the transcript. The order in question was made after a hearing at which evidence and a deposition were submitted to the court (R. 35, and affidavits in support of these motions). No part of this evidence has been brought to this court.

Injunctions are not granted as a matter of course, but only in the discretion of the court where an injunction is necessary to prevent irreparable injury. In *Thompson v. Nelson,* 18 C. C. A. 137, Judge Taft quoted the following language from *Duplex Printing Press Co. v. Campbell Printing Press etc. Co.,* 16 C. C. A. 220:

> "The motion for a preliminary injunction necessarily involved the exercise by him (that is, of the judge below) of a sound, judicial discretion in granting or withholding it. * * *. We are to consider the correctness of the order from the same standpoint as that occupied by the court granting it."

And in the *Thompson* case the court held that the same rule applied in an appeal from an order refusing an injunction. How can this court consider the motion for a temporary injunction from the same standpoint as that occupied by the court

refusing it when none of the evidence on which the lower court acted and perhaps not even all or any part of the record, is before this court?

In *Hemple v. Raymond,* 75 C. C. A. 526, this court, speaking through Judge Gilbert, said:

> "The burden is upon the plaintiff in error to show clearly and affirmatively from the record itself the facts constituting error. This rule is so firmly established as to require no citation of authorities."

How then can this court pass upon the order of the lower court respecting the injunction? As was said by Justice Lamar, in *New York etc. Co. v. Fraser,* 130 U. S. 611, 32 L. Ed. 1031:

> "To obtain a reversal of a judgment it is necessary that the fact, upon which such reversal is claimed, should appear from the record, sufficiently to be passed upon."

Assignments of error which cannot be intelligently understood and passed upon without reference to the evidence, do not properly present anything for consideration when the evidence is not brought up. *Bond vs. Winn,* 38 S. E. (Ga.) 328.

Since there is nothing which this court could possibly consider respecting the appeal from the order pertaining to the order to show cause, restraining order and injunction *pendente lite,* we submit that so much of the appeal should be dismissed.

It will necessarily follow from the dismissal of that part of the appeal that the restraining order formally continued in effect by the supersedeas will be at an end. The appellee will thereupon become immediately entitled to receive from the clerk of the District Court the fund in question, and all possibility of any relief to the appellee, even though its complaint should state a good cause of action, will cease. Under such a state of facts, with the dismissal of the appeal, insofar as its affects the 5th, 6th and 7th assignments of error, the possibility of this court granting any relief to the appellant will have ended, and for that reason alone the entire appeal should be dismissed. The rule that the appellate court will not retain jurisdiction over a case when by so doing it cannot affect the result as to the thing in issue, is elementary. It is well illustrated in *Kimball v. Kimball,* 174 U. S. 158, 43 L. Ed. 932. That action was begun by Maude E. Kimball claiming to be the widow of Edward C. Kimball, to obtain letters of administration on the estate of the deceased. Her right to administer was contested on the ground that she was not his widow. The lower court held that her claimed marriage to the intestate was void. After the writ of error had been entered in the Supreme Court, a will of Edward C. Kimball was found and probated. On the motion to dismiss, the Supreme Court, on authorities there cited, held that when an event occurs which renders it im-

possible for the appellate court, if it should decide the case in favor of the appellant, to grant him any effectual relief whatever, the court will not proceed to a formal judgment but will dismiss the appeal. In the case at bar, the court cannot review and ought not to retain jurisdiction over the appeal from the order respecting the injunction. This makes it impossible for the court, even though you should decide in favor of the appellant on the only other question in the case, to grant it any effectual relief; and on the authority of the *Kimball* case and cases there cited, you should not proceed to a formal judgment, but should dismiss this appeal in its entirety.

III.

ALTERNATIVE MOTION TO STRIKE TRANSCRIPT.

The appellee's third motion is for an order striking the transcript if the court refuses to dismiss the appeal in its entirety according to the first motion. The transcript is so fatally defective, as set out in our argument on the first motion, as not to amount to a transcript. It is merely a bundle of certified copies and is in no sense a record. In addition to the authorities already cited, we call the court's attention to:

Hospes v. N. W. Mfg. & Car Co., 43 N. W. (Minn.) 180,

Davis v. Harper, 14 App. D. C. 298,

Sand Point v. Doyle, 74 Pac. (Ida.) 861,

Kincaid v. Friedman, 73 Pac. (Kan.) 52,

Naylor v. Beery, 81 Pac. (Kan.) 473,

Beck v. Holland, 72 Pac. (Mont.) 972,

Burnham v. Dreggers, 32 So. (Fla.) 796,

Anderson v. Long, 37 So. (Fla.) 565,

Yeoman v. Shaeffer, 57 N. E. (Ind.) 546,

Gripton v. Jones, 53 Pac. (Kan.) 789,

Bank v. Hussey, 50 Pac. (Kan.) 977,

Scott v. Brown, 61 Pac. (Kan.) 460,

Barger v. Sample, 64 Pac. (Kan.) 1026,

Fortune v. Parks, 119 Pac. (Okla.) 134,

Territory v. Neligh, 10 Pac. (Ariz.) 367,

Finnegan v. Fernandina, 14 Fla. 72.

Elliott v. Deason, 64 Ga. 63.

The certificates in many, if not most, of the above cited cases were stronger than the certificates attached to the record in this case. There may be an attempt to argue that the certificate is aided by the praecipe. That idea is expressly negatived in *Yeo-*

man v. Shaeffer, 57 N. E. 546. In any event, the praecipe in this case could not aid the certificate because the praecipe does not purport to ask for all of the record but simply directs the clerk of the lower court to make a transcript of certain enumerated papers and send those enumerated papers "duly certified" to this court. The clerk followed the direction of the praecipe. He was not told to send up the record. He was not ordered to certify to the enumerated papers as being any part of the record below, or as having been used at any hearing. He was ordered only to certify to the correctness of certain copies. This he has done, and the record as so prepared under all the authorities, is not sufficient. In the case of *Sand Point v. Doyle,* 74 Pac. 861, the following apt language is found:

> "The transcript in this case contains no certificate showing that the papers and records it contains were used by the judge upon the hearing, but merely contains a certificate from the clerk that they are true and correct copies of the papers it purports to contain, as the same appear on file in his office. This certificate is good as far as it goes, but falls short of showing that the papers contained in the transcript were used by the District Judge upon the hearing of the motion. Many other papers and documents might have been used for aught this record shows, or many of the papers in this

transcript may not have been presented to the Judge at all. It would be a dangerous practice for this court to pass upon such appeals without having before it copies of all the papers used upon the hearing, properly identified by certificate as contemplated by statute."

IV.

MOTION TO STRIKE BILL OF EXCEPTIONS

This is an alternative motion to strike the bill of exceptions in case the court shall refuse to dismiss the appeal in its entirety, or shall refuse to strike the transcript in its entirety. The reason for the motion is that a bill of exceptions is not permitted by the federal equity practice except in those cases where some issue has been tried to a jury. The appellant cannot bolster up its record with something unknown to chancery practice. In *Southern Building & Loan Association v. Carey,* 117 Fed. 325, the court refused to sign a bill of exceptions, saying that *such a thing is unknown to and not permitted by the federal practice in equity cases.* In *Ex parte Story,* 12 Pet. 339, 9 L. Ed. 1108, Justice Taney said: "A bill of exceptions is altogether unknown in chancery practice."

In *Continental Trust Co. v. Toledo etc. Co.,* 99 Fed. 177, this was the only question involved. The authorities are there reviewed. The court among other things said:

> "I have taken pains to examine the authorities as to the duty of the trial judge in the Circuit Court of the United States to sign a bill of exceptions in an equity case. I find the authorities are overwhelming in favor of the proposition that no such thing as a bill of exceptions is known in the equity practice in the federal courts."

In *Dodge v. Norlin,* 66 C. C. A. 425 (431), the court said:

> "A bill of exceptions has no function and serves no purpose in a suit in equity or in bankruptcy. An appeal makes the entire record available to counsel for the appellant, and imposes upon him and upon the clerk of the lower court the duty of inserting in the transcript of the record sent to the appellate court everything material to the hearing of the questions to be presented there. *Teller v. U. S.,* 111 Fed. 119, 49 C. C. A. 263. The bill of exceptions must therefore be disregarded."

See also *Morrison v. Burnette,* 83 C. C. A. 391;

Laurel etc. Co. v. Galbreath etc. Co., 91 C. C. A. 196;

Gorham Mfg. Co. v. Emery etc. Co., 43 C. C. A. 511;

Simpkins Federal Equity Suit, (2 ed.) 737.

An examination of the record discloses the purpose of the appellant in attempting to insert here a bill of exceptions. According to the record in the lower court, it failed to take exceptions in that court to the order denying the injunction *pendente lite* and dissolving the preliminary restraining order (R. 35). This bill of exceptions is a manifest afterthought, the purpose of which is to provide the appellant with grounds for an appeal that did not exist as a matter of fact.

V.

ALTERNATIVE MOTION TO VACATE SUPERSEDEAS.

This appellee has moved the court that in the event the court does not dismiss the appeal in its entirety, the court make an order vacating the supersedeas.

At the time of the commencement of this action, the appellant made a motion for an order requiring the appellees to appear and show cause why an

injunction should not be granted. (R. 8). On that motion and the complaint and affidavit filed therewith, an order to show cause was issued and the appellees were required to appear for that purpose on October 29, 1912. It restrained the appellees as follows: "The said Johan Tiberg, his agents and attorneys, from demanding or receiving the proceeds of said gold dust and amalgam mentioned in the complaint, and the said defendant, John Sundback, clerk as aforesaid, from delivering up to said Johan Tiberg, or his order, the said proceeds or any part thereof." *No injunction was issued and the order citing the appellees to show cause and restraining them pending the hearing did not provide for any bond.* (R. 10, 11). The record before the court is silent as to what took place on October 29, 1912. There is nothing to show that any of the parties appeared at that time or that there was any hearing or any continuance. Nothing more appears to have been done until August 18, 1913, at which time the minutes show that some unidentified order to show cause came on for hearing and that at that time the court denied an injunction *pendente lite,* and dissolved "the preliminary restraining order heretofore issued herein." (R. 35). The minutes then read: "Upon motion of Mr. G. J. Lomen, it was ordered that the property in controversy in this action remain *in statu quo,* to-wit: in the hands of the Clerk of the Court for the present and until the

further order of the Court." (R. 36). The minutes do not show any process or notice of any kind requiring the defendants to appear on August 18, 1913; and no appearance as a matter of fact by either of the appellees or any counsel for them is shown by the record. In the order allowing the appeal, we find the following: "It is further ordered that an undertaking on appeal and to secure the defendants against damage by reason of the order heretofore made and hereby continued, be given by the plaintiffs to the defendants" conditioned among other things that the plaintiff shall answer for all costs and damages the defendants shall suffer "by reason of the order heretofore made and entered on the 18th day of August, 1913, directing said trust fund, involved in said action, to be held in *statu quo* in the hands of the Clerk of said Court, and it is further ordered that upon the filing of said bond, the order heretofore made directing the trust fund involved in said action to remain in *statu quo* in the hands of the Clerk of said Court, be, and the same is hereby continued, pending said appeal and until the further order of said court." (R. 43, 44). This was on October 9, 1913, and there is nothing to show that the appellees had any notice that any order of any kind affecting their rights would be made at that time.

Neither the order of August 18, 1913, nor the one of October 9, 1913, provides for any notice to the appellees or any right by them to be heard at any time.

The supersedeas in this case was granted improvidently because: *first,* the order to show cause was not an injunction, but merely a restraining order; *second,* the order to show cause fell by its own limitations on October 29, 1912; *third,* it could not be appealed from; *fourth,* it could not be continued by a supersedeas; *fifth,* the *statu quo* order does not even purport to continue any restraining order; *sixth,* the *statu quo* order itself was void because (a) not on notice or process, (b) not within the issues, (c) no return day was fixed or order to show cause issued, and (d) was not within the power or jurisdiction of the court; and *seventh,* the amount of the supersedeas is so insufficient as to show abuse of discretion.

Section 1219 Comp. L. of Alaska is the statute under which the order to show cause was issued and, so far as applicable, provides "an order may be made requiring the defendant to show cause, at a specified time and place, why the injunction should not be allowed, and *in the meantime* the defendant may be restrained." That section requires no bond. Section 1216 Comp. L. of Alaska permits the issuance of a temporary injunction, but specifically provides that the court shall require of the plaintiff a bond before allowing an injunction.

There is a well-settled distinction between restraining orders and injunctions. In *Wetzstein v. Boston etc. Co.,* 63 Pac. 1043, the court ruled on a petition for an order of supersedeas where a restraining order had been granted. Under a statute providing for an appeal from an order granting or dissolving an injunction or refusing to grant or dissolve an injunction, the Montana court held that there was no supersedeas on, and no appeal possible from, a restraining order, and said:

> "A restraining order is distinguishable from an injunction, in that a restraining order is intended only as a restraint upon the defendant until the propriety of the granting of an injunction, temporary or perpetual, can be determined, and it does no more than restrain the proceedings until such determination. Such an order is limited in its operation, and extends only to such reasonable time as may be necessary to have a hearing on an order to show cause whether an injunction should not issue." (Citing cases).

The statute in that case was the same as the statute (Sec. 1339 Comp. L. of Alaska) under which this appeal is taken.

In *State v. Wakeley,* 44 N. W. (Neb.) 488, an application was made for mandamus to compel the judge of the lower court to fix the amount of a supersedeas bond in a case where a restraining order

had been issued and a temporary injunction had been denied, and the restraining order dissolved. The court held that the restraining order was not an injunction within the meaning of the statute; that a restraining order "is purely transitory, and has not within itself the elements necessary for its continuance. On a decision either granting or refusing a temporary injunction, its vitality is gone, and it ceased to be binding upon the defendants in the action. * * * It simply suspends proceedings until an opportunity can be given for hearing the parties; and upon that hearing having been had, and a decision rendered upon the application, the whole force of the restraining order ceases by its own limitation. Any other conclusion would do violence to the intention of the legislature; for by it, if the contention of the plaintiff should prevail, it would enable the plaintiff in an injunction proceeding, upon a representation to a judge by petition, and such other methods as might be adopted, that great and irreparable injury would result from a failure to issue an immediate injunction, procure the restraining order mentioned by the statute, and then, in spite of the judge and the court before whom the case was heard, and even over an order directly refusing to grant an injunction, prevent the commission of the act until the case could be finally

heard in the appellate court, which was clearly not the purpose of the act of 1889." See also *Riggins v. Thompson,* 71 S. W. 14, and *State v. Baker,* 88 N. W. 124.

This restraining order ended by its own limitations on October 29, 1912. Not only did it expire by its own limitation at that time, but also for the reason that there was no hearing so far as this record shows on the return day. In *State v. Green,* 67 N. W. (Neb.) 162, where a similar question was involved, the court said: "No such hearing was had at the time designated, and therefore the restraining order, by its own limitation, ceased to have any binding force and effect, and could not be revived and continued in force by the giving of a supersedeas bond." It may be argued that the language of the order restraining the appellees "until said hearing, and until further order of the court" changes the rule. Such a claim is answered under a similar state of facts in *San Diego Water Co. v. Pacific Coast S. S. Co.,* 35 Pac. (Cal.) 651, in which the court said:

> "This order contained a clause restraining the defendant 'pending this order to show cause, and until the further order of this court.' There was no appearance by either party at the time the order to show cause was returnable, nor was the motion for an injunction continued or kept alive in any mode. The restraining

order, therefore, which is only authorized to be made pending the motion, fell with the motion. * * * If the phrase, 'and until the further order of this court,' could have the effect to prolong the restraining order beyond the pendency of the motion for an injunction, then it would convert the order into a preliminary injunction, which could not be operative until a bond was given."

See also *Hicks v. Michael,* 15 Cal. 107. If it be said that the record in this case does not show that there was not any appearance on October 29, 1912, we answer with *Miles v. Sheep etc. Co.,* 49 Pac. (Utah) 536, in which an order to show cause and restraining order was issued. It was contended that a restraining order which was returnable on March 2nd was still in force on November 20th. The court said: "In the absence of any such showing, we must assume that the order remained in force only until the time fixed for the hearing on the order to show cause." It may be argued that the lower court, as a matter of fact, did restrain the appellees until the further order of that court. The statute, however, Sec. 1219 Comp. L. of Alaska, permitted the court to make an order requiring the defendants to show cause "at a specified time and place" and to restrain the defendants "in the meantime". Any restraining order which purported to restrain the defendants after 1 P. M. of October 29, 1912, was void under the statute because not

within the power of the court to make. This is also apparent from *Ex parte Grimes,* 94 Pac. (Okla.) 668, a well considered case in which the restraining order in question used the language "until the further order of this court". The court held that that was simply equivalent to the language of the statute of that state reading, as does the statute here, "in the meantime."

No appeal could be taken from this restraining order or any order dissolving it. As we have heretofore shown in the argument on the first motion, an appeal can only be taken in the cases provided for by statute and the only statute on the question here that could give the right is Sec. 1339 Comp. L. of Alaska. Under the authorities above cited, that section gives no such right.

Neither the restraining order nor its force could be continued by a supersedeas. The civil code of Alaska contains no provisions respecting a supersedeas, but Sec. 1340 Comp. L. of Alaska makes all of the provisions of law in force on June 6, 1900, "regulating the procedure and practice" in cases brought by appeal or writ of error to the Supreme Court, or this court applicable to appeals from Alaskan courts. We are not, at this time, concerned with the power of this court to make an order staying the hands of every person interested pending the hearing and decision here, for this court has not been called upon to act. It can well be questioned

whether or not the act of a trial court granting a supersedeas pending an appeal is within the "porvisions of law now in force regulating the procedure and practice in cases brought by appeal," but however that may be, the appellant here can claim no greater right than is given by Sec. 1007 R. S. That section, read in connection with Sec. 1000 R. S., in which the form of the bond is provided, shows that there can be no supersedeas except in those cases where the writ of error or citation on appeal "may be a supersedeas". In the case at bar, it is not possible for the citation to be a supersedeas because there is nothing to supersede or set aside. *New River Mineral Co. v. Seeley,* 117 Fed. 981. In the Slaughter House Cases, 77 U. S. 273, 19 L. ed. 915, the court said:

> "It seems to be well settled everywhere, in suits in equity, that an appeal from the decision of the court, denying an application for an injunction, does not operate as an injunction or stay of the proceedings pending the appeal."

How much more is this true on an attempted appeal from an order dissolving a restraining order which is in no sense an injunction and which order fell of its own limitations some eleven months before any appeal was taken. It cannot be fairly said that the *statu quo* order of August 18th affects the rule. The case of *Hovey v. McDonald,* 109 U. S. 150, 27 L. ed. 888, well states the limits of the

power of the court in these matters. In that case a restraining order was first issued and subsequently a preliminary injunction was granted. Thereafter demurrers were sustained and the appeals dismissed. It will thus be noted that there was an injunction *pendente lite* in that case. After explaining the nature of a supersedeas and the rule in respect thereto, the court said:

> "But this case is not within the terms of the rule. There was no decree for a specific sum of money; there was no decree at all in favor of the complainants; and no execution was applicable to, or could be issued in the case, excepting an execution for the costs of the defendants. The truth is, that the case is not governed by the ordinary rules that relate to *supersedeas* of execution, but by those principles and rules which relate to Chancery proceedings exclusively. It depends upon the effect which, according to the principles and usages of a court of equity, an appeal has upon the proceedings and decree of the court appealed from, and the doctrines which apply to the *supersedeas* can only be brought in by way of analogy."

The court then shows that it may be that the decree has an intrinsic effect which can only be suspended by an affirmative order either of the court which makes the decree or of the appellate

tribunal, and that either tribunal, if the purposes of justice require it, has the power "to order a continuance of the *status quo* until a decision should be made by the appellate court, or until that court should order the contrary." Attention is then called to the rule of the Supreme Court which is expressly stated to have been made in recognition of this power and for the purpose of facilitating its proper exercise in certain cases. That rule reads:

> "When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by judge or justice who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party."

We believe no court has decided that the power exists in any court to make any order not strictly within the limitations of the rule laid down in the *Hovey* case. That rule is not applicable here because: *first,* it is limited to an intrinsic effect in the decree which it is possible to suspend by an affirmative order; *second,* it requires an affirmative order and therefore necessarily requires all of the prerequisites to the making of a legal order by its terms suspending that effect; *third,* it can only be

made "if the purposes of justice require it" which necessarily presupposes a right in the other party to be heard on that question; *fourth,* it can only be exercised so far as injunction cases are concerned where an *injunction* as distinguished from a *restraining order* has been granted, and *fifth,* the condition of the order must be to maintain the *status quo* "until a decision should be made by the appellate court, or until that court should order the contrary" instead of "for the present and until the further order of the (District) Court." None of these prerequisites can be found in the record before this court.

The *statu quo* order of August 18th does not even purport to continue in effect the restraining order. In fact, it is an anomalous order having neither kith nor kin in the legal family. On that day the court signed the final judgment dismissing the complaint. Then, without notice, process or appearance, so far as the record shows, but on an *Ex parte* application of the plaintiff, it was ordered that the property in controversy remain in *statu quo* "for the present and until the further order of the court". There was absolutely no order, within the language of the Hovey case, limiting the order to the time of the hearing in the appellate tribunal, or until the appellate tribunal should otherwise direct. The order of October 9th is of no more effect than the order of August 18th, because by its express terms it merely continued the order of

Auugst 18th. It does not purport to suspend some intrinsic effect of the decree, for even the restraining order had died a natural death on October 29, 1912. That is apparent from a comparison of the terms of the complaint, the restraining order and the *statu quo* order. The restraining order restrained the defendant Tiberg from doing certain things and the defendant Sundback from doing certain other things. The *statu quo* order does not purport to do either.

The *statu quo* order is void. Tiberg filed a demurrer to the complaint on February 8, 1913, (R. 12, 13). This constituted an appearance. (Sec. 1331 Comp. L. of Alaska). Having appeared, he was entitled to twenty days' notice before the time appointed for the hearing. Sec. 1331, 1325 Comp. L. of Alaska, and *Wilson v. Blakeslee,* 16 Pac. 872. This provision of the Code is found in the laws of Oregon for 1862. By the act of Congress of May 17, 1884, this provision of the laws of Oregon was adopted into the laws of Alaska. By so doing, Congress intended that this provision should be construed in the sense in which it was understood at the time in the system from which it was taken. *Metropolitan R. Co. v. Moore,* 121 U. S. 558, 30 L. ed. 1022. At the time of its adoption it was the settled rule in the State of Oregon that any order made without prior notice as provided by this sec-

tion was void. This appears from the decision of Justice Strahan in *Bush v. Geisey*, 19 Pac. (Ore.) 122, in which the court said, among other things:

> "It is manifest from these provisions of the Code that this was a case where a notice of a motion was necessary by the express requirement of the law, and, it appearing that no notice whatever was given, the time for filing the transcript was not enlarged. The appellant took the order without such notice at his peril, and now that his right to proceed without notice is questioned, the court has no jurisdiction whatever in the matter."

This case was decided on May 7, 1888, but the justice says that while he can find no reported case on the subject, it is within his own knowledge that such has been the practice.

It may be argued that the record fails to show that Tiberg was not given notice, but that is not sufficient. The presumption is that the lower court was without jurisdiction and its jurisdiction must affirmatively appear in the record. *King etc. Co. v. County of Otoe,* 120 U. S. 225, 30 L. ed. 623; *Brock v. Northwestern Fuel Co.,* 130 U. S. 341, 32 L. ed. 905.

Neither was the *status quo* order within the issues. The complaint never sought in any manney to keep a fund in the hands of the clerk, but sought to deprive the clerk of that possession

and deprive Tiberg of the right of possession. Where a court has power to make a *statu quo* order, it must still be within the issues. An order or judgment outside of the issues is a nullity. *Reynolds v. Stockton,* 140 U. S. 254, 35 L. ed. 464. If the *statu quo* order can be classified at all, it must be considered in view of the temporary language used, towit, "for the present and until the further order of the court", as merely an order restraining the defendants until the plaintiff could make an application for some injunction in regular form. As a new restraining order, however, the *statu quo* order was void because, as heretofore shown, the only purpose that a restraining order can serve is to restrain the defendants for a reasonable time until a hearing on an application for an injunction can be had. The only power that the district judge had to make such an order is contained in Sec. 1219 Comp. L. of Alaska and the order does not comply therewith and was therefore without jurisdiction.

The amount of the bond was also so insufficient as to show an abuse of discretion. No doubt it was made under a belief that this case falls within rule 13 of this court. It is no part of the duties of the clerk of the District Court of Alaska to hold money even as evidence. Sec. 367 Comp. L. of Alaska. It can well be doubted that the clerk's bondsmen are responsible for the ultimate delivery of this money. Even though they are, the total amount of

that bond which must secure not only these appellees, but all other parties, is $20,000. Sec. 376 Comp. L. of Alaska. The total bonds to which the appellees probably have a right to look in this case for the recovery of $14,345.02 and interest at 8 per cent. (Comp. L., Sec. 684) from October 29, 1912, and all costs and damages on this appeal, is $3250.00. (R. 45). The total possible bonds to which we can look, if it be found that the clerk's bondsmen can be held, is $23,250.00. Principal and interest now amount to about $16,000.00. The bond in this case is purely a personal bond. (R. 45 to 47). Under such circumstances, the courts almost uniformly have required that the bond should be in double the amount of money secured. In this case, the amount of the bond to which the appellees could certainly look is about one-fifth of the amount involved. If we include the clerk's bond, there is no way of telling just what the amount is because all other persons who have claims against the clerk could enforce their rights against the same bond. We submit that the bond is clearly insufficient.

If the supersedeas in this case has been granted without authority or the amount is so insufficient as to show an abuse of discretion, this court should vacate it. *Simpkins Fed. Eq. Suit,* (2d ed.) 714. Where the order is not appealable, the appeal is a nullity and there is nothing left on which a supersedeas can operate. *How v. How,* 5 Mass. 375. Where an injunction is purely prohibitive a super-

sedeas does not continue it. *Green etc. Co. v. Norrie,* 63 C. C. A. 432. Where a restraining order has been dissolved, a party is not entitled to have the order dissolving it superseded pending review. *State v. Baker,* 88 N. W. 124; *State v. Lichtenberg,* 30 Pac. 716; *State v. Greene,* 67 N. W. 162. The record in the clerk's office will show that these motions were made promptly. They involve the right of this court to go into the merits, and we submit that they should be decided before we have any consideration of the case on its merits.

VI.

ALTERNATIVE MOTION FOR A WRIT OF CERTIORARI TO CORRECT A DIMINUTION OF THE RECORD.

We believe that the foregoing motions ought to be granted and if the court does grant either the first, second or third motion, then there will be no necessity for a ruling upon this sixth motion.

We certainly do not need to present any authorities or extended argument on this motion. The appellant here seeks to review an order made by the District Judge on evidence then before him. None of that evidence has been brought to this court, as we have heretofore shown in the argument on the

other motions. That evidence is absolutely necessary to any review by this court of the order of the lower court. The motion in this case was seasonably made under rule 18. There is only one possible reason that we can imagine why this motion might be denied in the event that the court denies the first, second and third motions. That reason is that the appellant, as shown by the record, failed to take any exception to the order of the District Judge denying an injunction *pendente lite* and dissolving the restraining order. This court might properly hold that in the absence of any such exception this court could not review a discretionary order of the lower court, such as this was, even though all of the evidence were before this court.

BRIEF ON THE MERITS.

Not knowing just what the ruling of the court will be on the motions, we have decided to write the brief on the merits on the record as now before this court, as though no such motions were pending. We desire, however, to preserve all rights under these motions and that we shall not be deemed to have waived these motions by this brief on the merits. We are also at some disadvantage in not having the appellant's brief. The fact that

the attorneys actually writing the briefs are so far distant from each other, makes it impossible for us to hold the appellee's brief until the appellant's brief is served.

STATEMENT OF THE CASE.

The appellant commenced this action in equity in the District Court at Nome, Alaska, against the clerk of that court, and this appellee, Johan Tiberg. The complaint alleged that in September, 1910, Tiberg was arrested in Seattle, Washington, on a charge of crime and that at the time of his arrest the deputy United States marshal making the arrest, took from Tiberg's person $5,345.02 in cash and a draft for $9000.00, which Tiberg claimed as his property; that this money and draft was transmitted by the said deputy marshal to the clerk of the District Court at Nome, to be held by him in *custodia legis;* that this money and draft was the proceeds of certain gold dust claimed by the appellant to have been stolen by Tiberg from it in July, 1910; that the said clerk holds the proceeds thereof for the use and benefit of Tiberg and that Tiberg is insolvent. That complaint did not show in any way that the criminal action in connection with which the money and draft had been seized

had been terminated. (R. 3 to 7). At the time of the filing of the complaint, the appellant made a motion for an order to show cause directed to the appellees, requiring them to appear and show cause why an injunction should not issue and that in the meantime the defendants be restrained. (R. 8). An order to show cause was issued citing the appellees to appear on October 29, 1912, and show cause why an injunction should not be issued enjoining Tiberg from demanding and the clerk from paying this money. In this order to show cause the defendants were restrained "until said hearing, and until further order of the court". (R. 10, 11). The record does not show that there was any appearance by either the appellant or appellees on October 29th, or that there was any continuance or hearing of the matter at that time. On February 8, 1913, defendant Tiberg appeared in the case by filing a demurrer. (R. 12, 13). This demurrer was sustained. (R. 13, 14). In connection therewith the District Judge filed an opinion. (R. 14 to 24). Thereupon the appellant amended its complaint and as so amended the complaint alleged that Tiberg, while in the employ of the appellant, took and carried away gold dust, nuggets and amalgam to the value of $15,000 and upward, and after retorting the same he had procured therefor $5345.02 in cash and a draft for $9000; that in September, 1910, he was arrested by a deputy United States marshal in Seattle, Washington, on a charge

of having committed larceny by the stealing of the gold dust, nuggets and amalgam for which he had obtained the cash and draft; that at the time of his arrest this cash and draft were found in the possession of Tiberg and were at that time seized by the deputy marshal and transmitted and delivered to the appellee Sundback as clerk of the District Court and he holds the same for the benefit of the true owner and subject to the orders and directions of the District Court at Nome and not otherwise, the draft, however, having been cashed by the clerk; that Tiberg has demanded by oral motion addressed to said court a return to him of the property so taken from Tiberg at the time of his arrest and that Tiberg threatens to demand and claim the same from the said clerk. There is, however, no allegation that the clerk will deliver this property on Tiberg's demand or that the court will make any order or direction to the clerk so to do. In fact the complaint fails to show what ruling the court made on Tiberg's motion. (R. 25 to 30). Defendant Tiberg demurred to this amended complaint and his demurrer was sustained on August 9, 1913. (R. 31 to 33). Thereafter, in said cause, a judgment of dismissal was entered in which it is recited that a demurrer had been sustained to the complaint; that thereafter the plaintiff filed an amended complaint to which a further demurrer had been sustained "and the plaintiff having failed and refused to further amend its said complaint, it is by the

court ordered, adjudged and decreed that this action be and the same hereby is dismissed." (R. 33, 34). This was on August 18th. On the same day, but whether it was before or after the cause was dismissed the record does not show, a hearing was had upon "the order to show cause why an injunction *pendente lite* should not issue" and affidavits of Louis Stevenson and Johan Tiberg were presented. Thereupon the matter having been submitted, the court made an order denying the injunction *pendente lite* and "ordered that the preliminary restraining order heretofore issued herein be dissolved." (R. 35). On September 16, 1913, the appellant served a bill of exceptions in which it is recited that a complaint was filed to which a demurrer was sustained; that the plaintiff thereupon served and filed an amended complaint to which a demurrer was sustained and "judgment of dismissal of the action and for costs in favor of defendant Tiberg, was thereupon, *plaintiff electing to stand on its complaint,* on the 18th day of August, 1913, entered." (R. 36 to 38).

ARGUMENT.

THE FIRST ASSIGNMENT.

This is a claim that the court erred in sustaining the demurrer to the original complaint. After the

demurrer had been sustained, the appellant amended its complaint in an attempt to avoid the force of the opinion sustaining the demurrer. This court, in *Northern Pacific Ry. Co. v. Murray,* 31 C. C. A. 183 (187), held that where a plaintiff amended his complaint following a ruling of the court, that the action could not be maintained on the original complaint, any error in the ruling of the court was waived by the plaintiff's election to amend his complaint. You there held that it was open to the plaintiff to have stood upon his complaint or to have amended it, and said: "He was at liberty to take one of two roads, but not both; nor can he, at the same time, accept and reject the judgment under review." This well-settled rule is stated in 2 Cyc. 645 as follows:

> "If a party, after judgment upon demurrer to pleadings is given against him, under leave of court, amends the pleading demurred to he acquiesces in the judgment upon the demurrer, and will not be permitted to assign it for error in the appellate court."

Any pleading in Alaska courts may be once amended without leave. Sec. 992 Comp. L. of Alaska.

If the court should adopt any other view of the first assignment, we feel we can safely submit that assignment on the opinion of the district judge with the added suggestion that since the complaint

does not show that the case of the *United States v. Tiberg* had even been brought to trial, it does not appear from that complaint that the government is not still interested in the holding of, and therefore the clerk is obliged to hold, said property for use as evidence on the trial. As the court will notice, in both the original and amended complaints, the appellant has gotten itself into some ridiculous situations simply through a lack of frankness and willingness to plead facts about which there could not be, in the nature of things, any dispute.

Second, Third and Fourth Assignments.

Undoubtedly if the district judge did not commit reversible error, of which the appellant can complain to this court, in sustaining the demurrer to the amended complaint, there can be no merit in the third and fourth assignments. We therefore argue these three assignments together.

(1). *Appellant elected to stand on complaint.* The record in this case would indicate that the appellant stood upon its original complaint and not upon its amended complaint and that the court below dismissed the action with that understanding. The judgment of dismissal simply says: "The plaintiff having failed and refused to further amend its said complaint, it is by the court ordered, adjudged and decreed that this action be, and the same is hereby dismissed." (R. 34). But the

bill of exceptions specifically says that the plaintiff elected "to stand on its complaint." This allegation follows a specific reference to both the complaint and amended complaint, differentiating between the two by the use of the terms "complaint" and "amended complaint." (R. 37). The appellant here can maintain no claim of error based on the order sustaining the demurrer to the complaint, because any such claim was waived. (See our argument on the first assignment). On the other hand, it can maintain no claim of error on the order sustaining the demurrer to the amended complaint, because the appellant elected in the lower court to stand on the complaint. It is elementary that an election having once been made is binding. The rule is stated in 15 Cyc. 262 as follows:

> "An election once made, with knowledge of the facts, between co-existing remedial rights which are inconsistent is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding based upon a remedial right inconsistent with that asserted by the election."

See also *Klipstein & Co. v. Grant,* 72 C. C. A. 511.

It may well be that the district court, and perhaps with the consent of the attorneys for the appellees, allowed such an election, particularly in

view of the fact that the two complaints state different causes of action and are inconsistent with each other.

(2). *The amended complaint changes the cause of action and is inconsistent.* The original complaint proceeded on the theory that Tiberg claimed title to a certain fund, which fund belonged to the appellant, but was not in the possession of either Tiberg or appellant, and that there was an implied contract with the appellant that the appellees were holding such fund for the appellant. The prayer of the first complaint was simply that the appellees be enjoined from claiming or holding the proceeds and that the appellant be decreed the owner thereof. The amended complaint proceeds upon an entirely different theory. There is in it no allegation that Tiberg claims title. The allegation simply is that Tiberg took and carried away gold dust, nuggets and amalgam of the value of $15,000 and upwards, which he has converted to his own use; the proceeds thereof, by reason of the arrest of Tiberg on a criminal charge, has come into the custody of the appellee Sundback as clerk of the district court; that the appellant has a lien upon the proceeds in the hands of the clerk and the appellee Tiberg is liable to an accounting to the appellant. (See particularly Paragraph XII amended complaint, R. 29). The prayer in the amended complaint demands a money judgment against Tiberg in the sum of $14,345.02; that the appellant be

adjudged to have a lien on the fund in the hands of the appellee, Sundback, as clerk; that said fund be declared to be a trust fund to which the appellant is entitled; that the appellees be restrained pending the hearing on the merits and thereafter forever enjoined. In other words, the primary thing sought in the first complaint is a decree of the court quieting title in the appellant as against the appellees of certain money in the hands of the appellee, Sundback. There is not in the prayer of the complaint even any specific request that the fund be delivered to the appellant. Neither is there in that complaint any demand for a money judgment against either of the appellees except for costs, and there is no claim for a lien or an accounting. The primary thing sought in the amended complaint, however, is a money judgment against the appellee Tiberg in the sum of $14,345.02, together with a lien on the fund and what is in effect a foreclosure thereof, and that (manifestly with the foreclosure of the lien claimed) the title be decreed to be in the appellant as a *cestui que trust*. The prayer of the amended complaint does not contain any specific request for a delivery of the fund to the appellant, and the injunctive relief sought seems to be more incidental than is the case in the complaint. In fact, the amended complaint seems to abandon the theory on which the original complaint was drawn and it is even open to question that the appellant attempted to change from an equitable

to a legal action. It is manifest that the same evidence would not support both complaints. Therefore, there has been an attempt to change the cause of action. 1 Enc. Pl. & Pr. 566. This is not permissible either at common law or under the codes. 1 Enc. Pl. & Pr. 547 *et seq.* Neither is it permissible to change an equitable into a legal action or *e converso* by amendment. *Blalock v. Equitable Life Assur. Soc.,* 73 Fed. 655.

In any event, the amended complaint does not state a cause of action at law. The authorities are unanimous that property in *custodia legis* is not subject to legal process. As stated in 34 Cyc. 1367: "It is a well-settled doctrine of common law that replevin will not lie for goods in the custody of the law, any interference with the goods so held being considered an infringement of the prerogative of the court and a contempt thereof."

Wilde v. Rawles, 22 Pac. 897;

Cooley v. Davis, 34 Ia. 128;

Karr v. Stahl, 89 Pac. 669;

Covell v. Heyman, 111 U. S. 176.

(3). *The rule at law applies also in equity.* It is a maxim that "Equity follows the law." We are unable to find any authorities holding that property in *custodia legis* can be taken by a decree in, or process issued out of, a court of equity any

more than it can be by judgment or execution in a court of law. It is not apparent why any different rule should obtain. The rule at law is not due to any infirmity of the law, but is due to the fact that no interference with property in *custodia legis* is permitted. If property in *custodia legis* cannot be reached by a judgment based upon the verdict of a jury, it is difficult to perceive why the same property should be any more subject to a judgment based upon a decree of a court of equity. If a district judge sitting as a court of equity has the power to dispose of property in *custodia legis,* surely another district judge of coordinate jurisdiction would have the same power. Take a case in which a United States judicial district has in it more than one division. The judge of each division has coordinate jurisdiction throughout the entire district. Suppose that Tiberg had been tried and acquitted in Seattle, instead of at Nome. Then suppose that the district judge who sits regularly at Tacoma, but who has coordinate jurisdiction over the entire western district of Washington with the Seattle judge, should undertake to interfere with the possession of the clerk of the court at Seattle over this same fund held in the same way. Beyond any question, if the judge at Seattle has such power and jurisdiction, the judge at Tacoma would have the same power. Such a ruling would lead to an absurdity. On principle, the same rule applies in a court of equity

as in a court of law and property in *custodia legis* cannot be subjected to any possible judgment or decree except in the same case in which it was placed in the custody of the law.

(4). *No trust could arise.*

In *Perry on Trusts,* a work which has gone through six editions and is admittedly one of the best treatises on this subject, it is stated in Sec. 128, page 197 as follows: "If one who stands in no fiduciary relation to another, appropriates the other's money, and invests it in real estate or other property, no trust results to the owner of the money. There is no doubt of this principle upon all the cases."

In *Pascoag Bank v. Hunt,* 3 Edwards Chancery 583 and 6 New York Chancery Rep. 770, the complainants by a bill in equity charged their late cashier with the larceny of a bond and mortgage for $23,000.00 which he had converted into money and invested in loans and securities which were in possession of the cashier. A temporary injunction was granted and the matter was heard on a motion to dissolve the injunction. The opinion in that case is particularly applicable here as it indicates that a verdict of not guilty in a criminal court on the same charge would end all possibility of equity interfering. The opinion by the Vice Chancellor reads:

"The bill calls on the court to investigate a charge of embezzlement amounting to the crime of felony; and then to follow the funds abstracted and lay hold of a bond and mortgage which it is supposed the money of the complainants or their own bank bills went towards purchasing and apply said bond and mortgage to their indemnity. In the first place, I believe the complainants must be left to pursue their cashier, Hunt, in a court of criminal jurisdiction. And in the second place, if he should be found guilty, I still do not see where this court gets its authority to indemnify the complainants for their loss out of property acquired by Hunt. The bill does not show that he made the loan or advance, on the security of the bond and mortgage, for the bank; but, on the contrary, that he did it for his own benefit, although he might have obtained some of the means from their funds. I think the bill does not make out such a case of implied or resulting trust as gives the court of chancery any jurisdiction. Ordered, that the injunction be dissolved, with costs."

In *Doyle v. Murphy,* 22 Ill. 502, 74 Am. Dec. 165, there was a bill in chancery by Murphy and wife against the widow and heirs at law and administrator of Maurice Doyle. The bill alleged that the Murphys were the sole legatees and devisees of a Mrs. Catherine Byrne and that Mrs.

Byrne had delivered certain money to Maurice Doyle to pay certain debts, but that Doyle converted the money to his own use and that certain bonds were placed in an iron safe left with Doyle by Mrs. Byrne who locked it and kept the keys in her possession; but Doyle, by means of false keys, opened the safe, abstracted the bonds and placed in their stead forged bonds for a similar amount. The Master in Chancery found that the evidence substantiated the allegations of the bill. The Master's report was confirmed and a decree entered for the complainants. On appeal, this decree was reversed and the bill was ordered dismissed. The court said, *inter alia:*

> "And the acquisition of property by either larceny or trespass, it is believed, has never been held to create the relation of trustee and *cestui que trust.* And this is what the charge in the bill, and the evidence in its support, if it were believed, amounts to, and nothing more. If such facts were held to create a trust, the court would have jurisdiction in every case of larceny and trespass *de bonis* asportatis."

Cases can be found where courts have declared constructive trusts in property in the possession of a thief after the thief has been convicted of the larceny of that property in a criminal trial, but there is not in the books, so far as we have been

able to find, after an exhaustive search, a single case holding a man a constructive trustee of property which he is alleged to have stolen, but of which crime a jury has found him not guilty or of which he has not been convicted. We cannot even find a single case in which an equity court has held that it had jurisdiction under such circumstances. We challenge opposing counsel to produce a single authority in which any such rule is stated.

These attempts to impose constructive trusts have arisen probably more often in connection with banks than any other one institution. Morse in his work on Banks, first volume, Sec. 173, says:

> "If the cashier embezzles funds of the bank, and invests them, a court of chancery has no power to fasten a trust upon the investment, and to declare the cashier to be a trustee holding that he has purchased in trust for the bank. The mere fact that the cashier obtained the means of purchasing by a theft from the corporate funds, providing that he actually made the purchase in his own name, and on his own account, does not create such a case of implied or resulting trust as to give jurisdiction to a court of equity for the sake of taking possession of the purchased property, and in order that indemnification may be made from it to the bank."

(5). *Without title or possession there could be no trust.* The complaint in this case pleads affirmatively that Tiberg has not title, possession, or right of possession of this fund or any part of it. It also fails to contain any direct allegation that Tiberg is even claiming any title to, interest in, or lien on the fund. The purpose of the amendment in this particular was to avoid the ruling of the district judge that inasmuch as the complaint showed that Tiberg claimed title, he was entitled to a jury trial. On that issue, we assume that the appellant will argue here that the complaint does not show that Tiberg is claiming title to the fund. We believe that the complaint, taken as a whole, shows that he is claiming title; but for the purposes of this point, we will argue it on what must be the theory of the appellant.

Can a person be charged as trustee who, according to the bill in equity by which it is sought to establish such trust, has not the legal title, possession, or right of possession of and is not claiming any title to the property of which it is sought to have him declared a trustee? The question ought to answer itself. How can a man be held as a trustee of property of which, according to the bill, he has not and is not claiming either a legal or equitable title and has not possession or right of possession? Suppose an equity court should decree a man to be a trustee under such circumstances. What order would it make? Would it make an

order directing him to convey either the legal or equitable title to the *cestui?* He could not comply with such an order because, according to the bill, he has not either the legal or equitable title. Would it make an order quieting title in the plaintiff? That would be useless, because the complaint fails to show that the defendant is claiming title. Would it make an order directing the alleged trustee to deliver possession of the property? He could not because, according to the allegations of the bill, he has not possession. Would the court make an order directing an assignment of the right of possession? Under the allegations of the bill, he has no such right.

It will certainly be conceded that there could be no trust in this case unless it is a constructive trust and that Tiberg could not be a trustee unless he is a trustee *ex maleficio.* The rule is laid down in 39 Cyc. 169, that constructive trusts are trusts which arise by operation of law "whenever the circumstances under which property was acquired make it inequitable that it should be *retained by him who holds the legal title.*" This definition shows the necessity for legal title in the alleged trustee. We do not claim that there must necessarily be an actual legal title in personal property before a constructive trust may arise. In the case of real property, beyond a question, the record legal title must be in the alleged trustee or no constructive trust arises. Inasmuch, however, as the

possession of personal property is often proof of title, and the possession is in itself *prima facie* title to personal property, a constructive trust may arise as against the person who has not actual legal title, but who has the possession, that is, the *prima facie* legal title, of personal property. Many of the authorities lay down the rule that a constructive trust may arise as against the person who has the legal title. In considering these authorities, it must be understood that they treat the actual possession of personal property as legal title.

In *Walker v. Bruce,* 97 Pac. 250 (252), constructive trusts are defined as follows:

> "Constructive trusts are such as are raised by equity in respect to property which has been acquired by fraud, or where, although acquired without fraud, it is against equity that it should be retained by him who holds the legal title. Washburn on Real Property, Sec. 1430."

In *Borchert v. Borchert,* 113 N. W. 35 (37) the rule is stated: "An action lies to establish a constructive trust and to recover the subject thereof where the property wrongfully obtained in specie, or in its converted form, *still remains in the possession of the wrongdoer.*"

In *Christy v. Sill,* 95 Pa. St. 380, it is specifically laid down that a constructive trustee must have the manual possession of the property on which it is sought to impress a trust. The court

said: "He is not trustee for the title, for that he never acquired, but of the thing *which he has in manual possession.*"

In *Smith v. Des Moines National Bank,* 78 N. W. 238 (239), it is stated: "It is a general rule that anyone wrongfully *possessed of an estate* becomes a trustee *ex maleficio.*"

In *Moore v. Crump,* 37 So. 109 (110) the court states: "The complainants (appellees here), invoke the well-established and well-recognized doctrine that, where a grantee or devisee obtains the *possession and title* to land intended for another by actual fraud, on proof of the fraud, a trust will be raised in favor of the latter."

In *Fetter's Equity,* 198, the rule is stated: "When, on the grounds of justice and good conscience, without reference to the intention of the parties, equity considers *the holder of the legal estate* to be not entitled to enjoy the equitable or beneficial interest, it treats him as a trustee." To the same effect see 2 Pom. Eq. Jur. Sec. 1053.

In *People v. Houghtaling,* 7 Cal. 348 (352) the rule is stated:

> "The defendant is wrongfully *in possession* of a specific fund, belonging to the plaintiff, Said fund constitutes no part of the estate of Wright, and defendant's appointment as administrator of Wright, conferred upon him no authority to take or retain it. He occupies the

position, *who takes possession* without authority of property belonging to another, and may be treated as a trustee *de son tort.* Hill on Trustees, page 173."

The case of *Newton v. Porter,* 69 N. Y. 133, 25 Am. Rep. 152 is as favorable to complainant in this case as are any of the well-considered opinions, but it is laid down expressly there that equity can only impress the property with a constructive trust while it remains in the possession of the alleged thief or his assignee with notice, and that the action is against the person in possession. What right then, has the Pioneer Mining Co. to maintain this action against Tiberg? The bill in equity shows that Tiberg has not possession and they allege facts which, if true, would have prevented him from ever getting or transferring any legal title, because a thief can acquire no title to the property he steals or the proceeds thereof.

Silsbury v. McCoon, 53 Am. Dec. 307;

Bassett v. Spofford, 6 Am. Rep. 101.

Perry, in his work on trusts, Vol. 1, p. 520, makes it plain that a man cannot be a trustee unless he has the legal title and the primary use. He says:

"From these instances, it will be seen that, in order to create a trust, it is necessary to prevent the legal estate from vesting in a

cestui que trust, and it is necessary that not only the *legal title,* but the *primary use,* should vest in the trustee."

This author further makes it plain that a court of equity has no power to prevent a trustee from reducing a trust fund to possession. This court could only grant an injunction on the theory that Tiberg is a trustee, and we submit that it would be the first time that an equity court ever enjoined a trustee from taking possession of the trust estate. Mr. Perry says: "The trustee, being liable for a breach of trust, if he permits any misapplication of the funds, *should of course have the possession and control* of all personal property." Vol 1, page 558.

(6). *An equity court is asked to review an adjudicated charge of crime.* The complaint affirmatively alleges that the money came into the possession of the clerk of the court in connection with a charge of crime and that this charge has been adjudicated. The equity court is then, in effect asked to review and revise the adjudication in the criminal case and to direct what the law court shall do in the criminal case with certain evidence therein. There is no case in the books where any court has ever assumed to possess any such power or jurisdiction. There are cases in which the pleading affirmatively showed that the defendant in a criminal case had been convicted and in which the court gave the adjudication in the criminal case

its full weight and disposed of the property of which the defendant in the criminal case had been found guilty of stealing. The basis of this power has been expressly placed by some of the courts on the theory that the defendant could not complain because he has been convicted in a criminal action. In other words, while the criminal action is not, of course, in a strict sense, an adjudication, another court called upon to pass upon the title or right of possession of the property of which the defendant in the criminal case was found guilty of stealing, treats the adjudication in the criminal case as in effect, binding in a suit in which both the parties and issues are different.

In any event, as the district judge in this case states in his opinion, the presumption of innocence obtains. All of the authorities hold that in a civil action over the same property of which the defendant was convicted of stealing in the criminal case, the presumptioin of innocence obtains. Some of them deny that the crime must be proved in the civil case beyond a reasonable doubt, but they then proceed to state the rule in words that mean the same thing. See

2 *Greenleaf Evidence,* Sec. 408;

Thurtell v. Beaumont, 1 Bing. 339, 8 Eng. Com. Law Rep. 531;

Taylor's Evidence 97;

Bishop on Marriage & Divorce, Sec. 644;

Thayer v. Boyle, 30 Me. 475;

Butman v. Hobbs, 35 Me. 228;

McConnell v. Mutual Insurance Co., 18 Ill. 229;

Pryce v. Security Insurance Co., 29 Wis. 270;

Freeman v. Freeman, 31 Wis. 235;

White v. Comstock, 6 Vt. 405;

Brooks v. Morse, 10 Vt. 37;

Ricker v. Hooper, 35 Vt. 457.

(7). *The bill shows no equity.*

(a). It is elementary, of course, that the complaint must show that the plaintiff has not an adequate remedy at law. *The complaint in this case does not show that Tiberg has not been convicted.* If he has been convicted of stealing the described property, then the plaintiff has an adequate remedy under Sec. 2375 Comp. L. of Alaska, by means of a summary proceeding in the criminal case in connection with which the fund in question came into the custody of the law.

(b). The complaint contains no allegation that there is either probability or possibility of this money being delivered to Tiberg irrespective of any relief the appellant may or may not get in the pending case. There is no allegation that the clerk

is about to pay or will deliver this fund to Tiberg or that the court is about to or will make any order for its delivery. The fund being in *custodia legis* can only be returned by the clerk on the order of the court, which order must be made in the case in which jurisdiction over the fund was obtained. The only allegation in the amended complaint as to any facts showing the possibility of damage is "that the defendant Tiberg has demanded, by oral motion addressed to said court, the return to him of said deposit in the hands of his said co-defendant, and threatens to demand and claim the same, and unless restrained from so doing, he will demand and claim said deposit, and the said proceeds of said gold dust, nuggets and amalgam from his said co-defendant, Sundback, and of this court." There is not even any allegation as to what the court did on Tiberg's oral motioin. The complaint must show equity. Perhaps the court denied that oral motion. Mere apprehension or possibility of wrong and injury by defendant is not enough to warrant an injunction. The complaint must show at least a reasonable probability of wrongful action and irreparable injury before an equity court will interfere. *Hurd v. Atchison T. & S. F. Ry. Co.,* 84 Pac. 553. It is too elementary to need the citation of further authorities that equity courts will not take jurisdiction of actions which merely seek to prevent a person from making demands for the possession of personal property, there being nothing in the

complaint to show even a possibility that the demand would be complied with by any person.

(e). The sole ground of equitable jurisdiction claimed in the complaint is insolvency of Tiberg. In the first place, if the fund in question was delivered to Tiberg, it is very apparent that he would be able to respond in damages and could be compelled to pay a judgment at law to the extent of $14,345.02. In other words, the facts pleaded in the complaint negative the conclusion of insolvency. Moreover, an equity court will not take jurisdiction merely because of insolvency and a bill in equity that states no other ground for equitable interference is demurrable. If insolvency be admitted, the rule is that that alone does not make the remedy at law inadequate. If it did, then every man who had a suit against a defendant, where the defendant is unable at the time to pay the judgment rendered, could bring his suit in equity and deprive the defendant of a jury trial. This is obviously not the law.

Pensacola etc. Co. v. Spratt, 91 Am. Dec. 747; 12 Fla. 26;

Heilman v. Union Canal Co., 37 Pa. St. 100;

Mechanics Foundry v. Ryall, 17 Pac. 703;

Centerville etc. Co. v. Barnett, 2 Ind. 536;

Moore v. Halliday, 72 Pac. 801;

Dills v. Doebler, 26 Atl. 398; 36 Am. St. Rep. 345; 20 L. R. A. 432;

Brown v. Birmingham, 37 So. 173;

Reyes v. Middleton, 17 So. 937; 51 Am. St. 17, 29 L. R. A. 66.

The language of the *Mechanics Foundry* case is very apt. That was an action to restrain a trespass and there was an allegation both of irreparable injury and of insolvency. The court said: "Nor will equity interpose to restrain a trespasser simply because he is a trespasser and is insolvent." The plaintiff in this case could not possibly recover without proving a trespass.

In the *Dills case,* an action was brought to restrain a person from resuming the practice of dentistry in a certain city without the payment of a sum fixed upon by contract between him and a former associate. The bill set up the contract, its breach, and the insolvency of the defendant and alleged that the plaintiff had no plain, speedy and adequate remedy at law. The lower court granted an injunction. This was reversed by the Connecticut Supreme Court on appeal. The court said:

> "The brief of the plaintiff's counsel suggests that the defendant is insolvent, and that the plaintiff could not collect the damages if he should obtain a judgment therefor. There is no finding to that effect; and if it were so,

that fact could not give to a court of equity, the right to issue an injunction. It is the contract itself which gives to or takes away from the court its jurisdiction, not the wealth or poverty of a party defendant. *Nessle v. Reese,* 19 Abb. Pr. 240, 29 How. Pr. 382."

Therefore, in the case at bar, it must be the allegation that the defendant Tiberg wrongfully took this gold dust which gives to or takes away from this equity court its jurisdiction. That jurisdiction cannot be aided by a mere allegation of insolvency and, under all the authorities, the allegation as to the taking of the property and of the title thereto, is a question of law to be determined by a jury.

The rule is: "Where the main object of suit is to settle title, an injunction to restrain a trespass will not be granted merely because of the insolvency of the defendant."

22 Cyc. 839;

Strang v. Richmond, 93 Fed. 71;

Godwin v. Phifer, 41 So. 597;

Morgan v. Palmer, 48 N. H. 336;

Pensacola etc. Co. v. Spratt, 91 Am. Dec. 747:

In this last case, part of the syllabus reads: "Insolvency of defendant is not of itself sufficient to

authorize granting of injunction. There must exist some other equitable grounds for the interposition of the court."

In the *Strang* case, the court said:

> "Complainant comes into this forum because of alleged inadequacy of relief at law. This, in a large measure, depends upon the character of the relief to which he is entitled, unless it be that upon the mere allegation of insolvency he is entitled to redress in a court of equity. This is not my understanding of the law. Something more than an apprehension that a judgment, if obtained, will not prove availing, on account of insolvency, is necessary to justify a court of equity in reaching forth its hand to give relief. Serious consequences may result by this action on the part of the court. The right of trial by jury is denied the parties, and courts of equity should only intervene where the remedy at law is plainly inadequate; that is to say, where, by the ordinary legal procedure, the merits of the controversy, according to right and justice, cannot be gotten at, and relief afforded. 1 Story, Eq. Jur. Sec. 33, and note; *Hyer v. Traction Co.*, 168 U. S. 471, 480, 18 Sup. Ct. 114; *Fallon v. R. R. Co.*, 1 Dill. 125, 126, Fed. Cas. No. 4629."

In the *Godwin case* the court said:

> "The insolvency of the debtor is never a sufficient reason of itself for the exercise of the

extraordinary power of the court by way of injunction. There must be some other equitable ground combined with insolvency."

What other equitable ground is there in this case?

The case turns on the question of title which is purely a question of law. The claim that Tiberg is trustee is purely a pleading of a legal conclusion which also turns on the question of title involved. There is no equitable ground except insolvency.

(c). The appellant has an adequate remedy at law. It can bring an action at law in connection with which defendant Tiberg will be entitled to a jury trial. In an ancillary proceeding, after the commencement of such an action at law, if the facts warrant, it could get either an injunction in aid of the law action, or an order that the money be paid into the registry of the court to abide by the outcome of the action, or all of the interested parties might be compelled to interplead. The clerk cannot be compelled to deliver the money until after an order of the court made in the case of *U. S. v. Tiberg.* These are clearly remedies which are plain, speedy and adequate. That the appellant in this case has an adequate remedy at law, see, *The Sultan v. Providence Tool Co.,* 23 Fed. 572; *Dumont v. Frye,* 12 Fed. 21; *Edelman v. Latshaw,* 28 Atl. 475; *Buzard v. Houston,* 119 U. S. 347, 30 L. Ed. 451; *Sawyer v. Atchison etc. Co.,* 129 Fed. 100; *Fletcher v. Root,* 88 N. E. 987; *Lawrence v.*

Times Printing Co., 90 Fed. 24; *Paine v. Doughty,* 96 N. E. 212; *Deepwater Ry. Co. v. Motter,* 116 Am. St. Rep. 873, 53 S. E. 705.

In the *Lawrence case,* 90 Fed. 24, an attempt was made to have the Times Printing Co. declared a trustee *ex maleficio* of certain property, but the court held that inasmuch as the property in question was capable of manual possession they could recover in an action at law. The court said:

> "They say that the complainant asserts ownership and legal title to the franchises in question, but that, through the fraud of the respondent the Times Printing Company, the possession and enjoyment of his property rights in this and other valuable things, such as the good will, name, etc., of said newspaper, are unlawfully withheld from him; that the conduct of the Times Printing Company in the particulars alleged in effect places that company legally in the attitude of a trustee *ex maleficio,* or a transferee under a fraudulent conveyance holding the property for the real owner. Their argument rests upon the proposition that the franchise, the good will, the name, and the circulation of the newspaper are specific articles of property, capable of being transferred and reduced to possession by the acts of the parties, and that said property has a legal situs within this district, and is therefore within the jurisdiction of this court, so that the

court may, by its decree, enjoin the *mala fide* holder from using the same, and also protect the rightful owner in the exclusive use and enjoyment thereof. * * *.

As to the books containing accounts and names of subscribers and patrons of the newspaper, they are articles of which manual possession may be taken , and which may therefore be recovered in an action at law. Therefore a court of equity is without jurisdiction to assist the complainant in recovering possession of said property."

(8). *The title to this fund is involved and cannot be tried in this action.* No doubt the appellant will claim that the amended complaint does not show that Tiberg claims title to this property. We think, however, that the amended complaint, taken as a whole, and particularly Paragraphs V and XI, show that Tiberg claims title. In fact, the appellant pleads a title in him derived by conversion. The rule is elementary that an equity court will not interfere to protect a claimed right in property until the complainant has established his title by an action at law. In 22 Cyc. 818, the rule is stated:

"As a general rule, a court of equity will not interfere to protect legal rights in property until the complainant has established his title or right by an action at law, especially where

the answer denies the title of the complainant to the property sought to be protected."

In 22 Cyc. page 821, the rule is laid down: "Likewise equity will not try title to personal property in an injunction suit."

In *Kistler v. Weaver,* 47 S. E. 478 (479), the rule is stated:

> "An injunction will not issue when the title to personal property is the sole question involved. The question of title cannot be tried in that way. *Baxter v. Baxter,* 77 N. C. 118."

See also:

Young v. Young, 9 B. Mon. (Ky.) 66;

Power v. Alger, 13 Abb. Pr. 284;

Cumberland etc. Co. v. Allen, 6 Ky. Law Rep. 741.

In *Tacoma Railway & Power Co. v. Pacific Traction Co.,* 155 Fed. 259, it was held that complainant had no standing in a court of equity to obtain an injunction because the object was to obtain an injunction to protect a disputed legal right and that a showing that defendant claimed title adversely to the complainant, put the complainant out of court. That decision is based on *Erhardt v. Boaro,* 113 U. S. 537, 28 L. Ed. 1116, in which the Supreme Court of the United States held that where an equitable suit was merely ancillary to an action at law to establish the title, the equity court, in

the ancillary proceeding for the purpose of preventing irremediable mischief, could preserve the property from destruction pending the legal proceedings. The court there makes it plain that an equity court has no power to try title and that an issue raised as to title puts the complainant out of court unless the action is merely ancillary to a suit at law. In other words, the equity court does not try title and does not permit complainants by subterfuges to prevent defendants from having questions of title tried to a jury. In *Lanier v. Alison,* 31 Fed 100, it was specifically held that complainant must proceed at law for the assertion of her title. See also: *Simmons v. Day,* 114 N. W. 853; *Hamilton v. Brent Lbr. Co.,* 28 So. 698; *Vaughn v. Yawn,* 29 S. E. 759; *Toledo etc. Co. v. St. Louis etc. Co.,* 70 N. E. 715; *Munyos v. Filmore,* 76 S. W. 257; *Stone v. Snell,* 94 N. W. 525; *North Shore R. Co. v. Pennsylvania Co.,* 44 Atl. 1083; *Watson v. Farrel,* 12 S. E. 724; *Lownsdale v. Grays Harbor Boom Co.,* 117 Fed. 983; *Todd v. Statts,* 46 Atl. 645; *Hume v. Burns,* 90 Pac. 1009; *Allott v. American Strawboard Co.,* 86 N. E. 685; *Eastern Oregon Land Co. v. Willow etc. Co.,* 187 Fed. 466; *Imperial Realty Co. v. West Jersey etc. Co.,* 81 Atl. 837; *St. Louis etc. Co. v. Wervess,* 23 Fed. 691. In *Cumberland etc. Co. v. Allen,* 6 Ky. Law Rep. 741, is was held:

"Equity will not interpose by injunction to enable parties to try title to personal property; the remedy at law being sufficient for that purpose."

In *Young v. Young,* 9 B. Mon. (Ky.) 66, an injunction was brought to prevent the transfer of two slaves. Plaintiff claimed to own the slaves and alleged that the defendant was in possession of them and was about to sell them to the irreparable damage of the plaintiff. Defendant denied the title of the plaintiff and the court held that the issue as to title put the plaintiff out of court.

(9). *Sundback could not be held as trustee and therefore there is an improper joinder of parties defendant.* The appellee, Sundback, does not claim to hold under Tiberg. It is elementary that if A is a trustee of certain property and B takes under A with knowledge of the trust, B becomes a trustee, but B must take by virtue of a voluntary conveyance on the part of A before the mantle of the trust will fall on B's shoulders. In this case, Sundback does not hold under Tiberg because Tiberg was dispossessed by superior force and Sundback claims under and by virtue of that superior force and his official position.

(10) *Equity cannot operate to prevent a trustee taking possession of trust funds.* The amended complaint seeks to charge Tiberg as a trustee and

then to prevent him as trustee from taking possession of the funds. We challenge opposing counsel to cite a single authority sustaining such a position. It is laid down by Perry in his work on Trusts, Vol. 1, page 704, as follows:

> "The first duty of the trustee, after his appointment and qualification to act, is to secure the possession of the trust property."

The complaint alleges that Tiberg is a trustee and then asks the court to enjoin the alleged trustee from doing what the authorities say is his first duty. These positions are clearly inconsistent.

(11). *The money cannot be identified.* The complaint alleges that Tiberg took gold dust, etc., retorted it and delivered the amalgam so retorted to the assay office and received a certificate therefor; that thereafter this certificate was cashed and Tiberg received for it $5345.02 in cash and a negotiable draft, and that this draft had been since cashed by the appellee Sundback. It was held in *Union National Bank of Chicago v. Goetz*, 138 Ill. 127, 32 Am. St. Rep. 119, that the right to pursue as a trust fund property which has been wrongfully converted into other property, fails when the means of ascertaining its identity is lost, and that *as a matter of law such means of ascertaining its identity is always lost when the subject matter is turned into money or becomes confounded in a general mass of property of the same description.*

Justice Story, in his work on Equity Jurisprudence, Vol. 2, Sec. 1258, says that the right to follow the property converted "ceases when the means of ascertainment fails, which, of course, is the case when the subject matter is turned into money, and mixed and confounded in a general mass of property of the same description." What else has happened in this case? In the case of *School Trustees v. Kirwin,* 25 Ill. 62, the court held that an action of this kind could be maintained only against a person *in possession* of trust property and that the funds in that case having been deposited in the bank, its identity as a fund was lost and the court of equity was powerless. The court said:

> "When it was received into the bank, the money was mixed up with the money of the bank, and its identity as a fund thereby lost. It never appeared on the books of the bank as a part of the school fund or school money. * * * The means of ascertaining the identity of this fund having failed, by the money having been mixed and confounded in a general mass of property of the bank of the same description, the right to pursue it must also fail."

In the case of *Thompson's Appeal,* 22 Pa. St. 16, the Supreme Court of Pennsylvania said:

> "The right of pursuing it (alleged trust fund) fails when the means of ascertainment fails. This is always the case when the sub-

ject matter is turned into money, and mixed and confounded in a general mass of property of the same description."

To the same effect see: *Goodell v. Buck,* 67 Me. 514; *Portland etc. Co. v. Locks,* 73 Me. 370; *U. S. v. Inhabitants of Waterborough,* 2 Ware 158; *Englar v. Offutt,* 70 Md. 78, 14 Am. St. Rep. 332; *Johnson v. Ames,* 11 Pick. 173.

With respect to the identity of this fund, Perry on Trusts, Vol. 1, p. 1358, says:

> "But if the identity of the fund is lost, as by mixture with private funds, and the whole deposited to a private account, the *cestui* will stand on no better footing than other creditors of the trustee."

Lord King in *Deg v. Deg,* 2 P. Wms. 414, long ago remarked that:

> "Money has no earmark, in so much that if a receiver of rents should lay out all the money in the purchase of land, or if an executor should realize all his testator's estate and afterwards die insolvent, a court of equity could not charge or follow the land."

The same thing has been held as to bank notes and negotiable bills. *Cox v. Bateman,* 2 Ves. 19; *Whitcomb v. Jacobs,* 1 Salk. 160; *White v. Whorwood,* 2 Atk. 159.

(12). *The property having been taken from Tiberg's person in connection with his arrest on a*

criminal charge, it cannot be subjected to any process either legal or equitable until it has first been returned to Tiberg, or until he has been convicted of stealing that identical property. The fourth amendment to the Constitution of the United States guarantees to the people security for their persons, houses, papers and effects against unreasonable searches and seizures. The fifth amendment contains an inhibition against taking property without due process of law. Our laws do not permit the forfeiture of property rights by reason of a conviction for a crime, and certainly not when the criminal case has merely been "adjudicated." The possession of personal property is *prima facie* proof of title and both title to and possession of personal property are property rights which are protected by the fifth amendment and of which a person cannot be deprived without due process of law. The seizure and search incidental to the arrest of a person on a criminal charge, are certainly not due process of law, insofar as the title to and right of possession of the property removed from his person is concerned. Amendments four and five are limitations upon the territories and their courts. *Ty. v. Cutinola,* 4 N. M. 160.

Tiberg was deprived of his possession in connection with a criminal charge. That criminal charge being "adjudicated," the money must first be returned to him from whom it was taken before it can be reached by any process.

Welch v. Gleason, 5 S. E. 599;

Holkner v. Hennessey, 42 S. W. 1090, 39 L. R. A. 165;

Sturtevant v. Bohn, 78 N. W. 265;

Hill v. Hatch, 63 Am. St. 82, 41 S. W. 349;

Dale v. Brumbly, 64 L. R. A. 112;

Baker v. Peterson, 77 N. W. 774;

Allen v. Gerard, 44 Atl. 592, 79 Am. St. Rep. 816;

U. S. v. Parker, 166 Fed. 137;

Cowart v. Caldwell, 68 S. E. 500;

Priestly v. Hilliard, 187 Fed. 784;

Morris v. Penniman, 74 Am. Dec. 675;

Robinson v. Howard, 7 Cush. 257, 61 Mass. 257;

Commercial Exchange Bank v. McLeod, 65 Iowa 665, 54 Am. Rep. 36;

Richardson v. Anderson, 18 S. W. 195.

The Massachusetts case of *Robinson v. Howard, supra,* is squarely in point. In that case, the plaintiff tried to impress a trust upon property in the hands of an officer, which property the officer had taken off of an arrested person by virtue of a criminal warrant. In that case, as in this one, the arrest-

ed person and the officer were made defendants and the defendant in the criminal charge had been acquitted. The claim made in the bill was that the officer was a trustee. The alleged trustee made a showing that he took the articles as officer at the time he arrested his co-defendant for larceny and that the co-defendant had been discharged from the criminal charge. The court said:

> "The court are of opinion, that the judgment of the court of common pleas ought to be affirmed, and the trustee discharged. The trustee was an officer charged with the service of criminal process, issued on the complaint of this plaintiff. He acted by color of his office, and, as incidental to the service of the process, took from the trustee the money and property in question, declaring it to be in performance of his official duty, which was to carry the defendant before the examining magistrate. * * * The property was taken by him as a public officer, performing an official duty. We should fear that any other construction would lead to a gross abuse of criminal process. Such process might be used to search the person, or otherwise, under color of lawful authority, to get possession of the property of a debtor, in order to place it in the hands of the officer, and thus would make it attachable by trustee process." The case was dismissed.

The same thing has been tried in several other cases in an attempt to get around the rule that money in the hands of an officer cannot be garnisheed. The courts have uniformly held that property in the hands of an officer can no more be impressed with a trust than it can be garnisheed.

The courts uniformly hold that if the officer in question is not holding officially, his possession is the possession of the defendant in a criminal case and that his possession being wrongful, no advantage whatever can be taken of it. If, however, the possession of the officer is rightful, the rule is as stated in the *Cowart case,* 68 S. E. 500:

> "The general rule is that while property or money is in *custodia legis,* the officer holding it is a mere hand of the court; his possession is possession of the court; to interfere with his possession is to invade the jurisdiction of the court itself; and an officer so situated is bound by the orders and judgments of the court whose mere agent he is and he can make no disposition of such money or property without the consent of his own court, express or implied."

In the case of *Holker v. Hennessey,* 42 S. W. 1090, the court said:

> "An officer is not liable by the trustee process to a creditor of a person arrested by him on a criminal warrant for money or other

property taken by the officer under color of official duty from the person of his prisoner and for which he gives the latter a receipt."

Quoting from *Morris v. Renniman,* 14 Gray, 220:

"Such process might be used to search the person or otherwise under color of lawful authority to get possession of the property of the debtor in order to place it in the hands of the officer and thus make it attachable."

Where is there any difference in the present case, when property taken in the same manner is sought to be tied up by injunction until it is disposed of by a judgment in a civil action? The same court in the *Renniman case, supra,* cited in the *Hennessey case,* goes on to say:

"No such abuse of criminal process should be allowed. The people should be secure in their persons, papers, homes and effects and from unreasonable searches and seizures."

In the *Hennessey case* above cited, the court further says:

"The rule of general application is that money or property which has come into the hands of an officer of the court by virtue of legal process, is regarded as in the custody of the law and cannot be taken from him under other process, either of execution, attachment or garnishment. * * * The officer in such

case is the mere agent of the court and custodian of the property and to permit an interference with his possession would be to interfere with the jurisdiction of the court, and divert the property from the purposes for which it is held. No one could reasonably claim that money or other property taken from the person of a prisoner and held to be used as evidence of a criminal charge, could be taken out of his possession by other legal process *whether of the same court or another at least until final judgment of conviction.*"

Is not the language last quoted absolutely decisive of this question?

In the case of *Dahms v. Sears,* 11 Pac. 891, the court says:

> "The security of the public may justify the searching of a prisoner confined in prison upon criminal or even civil process and taking from him of any property in his possession that would aid him to make an escape * * * but to allow private parties to take advantage of the circumstances in order that they may secure a personal benefit would be a violation of that faith which the commonwealth owes to persons held in custody under its authority and laws. It would lead to oppression and abuse. The object and purpose of an arrest under civil and criminal process would be perverted

and schemes and devices be resorted to by importunate creditors to enforce a payment of their demands that would outrage justice and the right to personal security."

We respectfully ask why the same reasons do not apply to the present case where the property is sought to be reached by a civil process?

The case of *State v. Williams,* 16 N. W. 586, is squarely on all fours with the case at bar and decisive of the question involved. In this *Williams case,* the defendant was accused of stealing money which was taken from him by search warrant and the money deposited in the hands of the Clerk of the Court. Quoting from the opinion:

> "After the acquittal upon the indictment the defendant filed a motion for an order for the return of the money to her which motion the court overruled. The court against the objections of the defendant, ordered a jury to be called to try the title to the money. The defendant filed a motion to dismiss the case which motion was overruled. A trial to a jury was then had and resulted as above set forth. (The jury found the money in question to be the property of the prosecuting witness). If the defendant had been convicted of stealing the money in question, the duty of the District Court would have been clear. Sec. 4657 of the Code provides that 'if the property stolen or

embezzled has not been delivered to the owner, the court before which the conviction was had may, on proof of his title, order its restoration.' In such case the conviction would be sufficient evidence that the money did not belong to the defendant. The only question for the court would be as to whether it belonged to the person from whom it was alleged to have been stolen. The court, we presume, might properly enough proceed to determine such question in a summary way. No third person would be affected by the finding. But we have a case where the defendant was acquitted. We must presume then that the money was not stolen. For such a case the statute seems to make no provision. It was probably not deemed necessary to make any provision. The money having been forcibly taken under a search warrant from a person presumptively innocent, it would seem to follow as a matter of course that the person holding the money in custody should deliver it to the person from whom it had been thus taken. We do not say that the judgment of acquittal was conclusive evidence of title in the defendant, all that we hold is *that this action having been determined in the defendant's favor, she was entitled to go out of court and be placed in the same situation in which she was before the money was taken, leaving Miller,*

or any other person who may claim the money, to pursue his remedy by action in his own name.'' Case reversed.

The case in effect holds that it is not, under such circumstances, for the court, in disposing of a motion for the return to the defendant of alleged stolen goods, to hear any evidence as to title either by calling a jury or without a jury. The point decided is that the *status quo* must be restored before the property can be reached by civil process. There is no real distinction between the Iowa Statute and the Alaska statute on the same subject. Sec. 2375 Comp. L. of Alaska reads:

> "That if property stolen or embezzled has not been delivered to the owner the court before which the trial is had for the stealing or embezzling may on like proof and condition, order its delivery to the owner or his agent."

The Iowa statute uses the words "before which the conviction is had," while the Alaska statute uses the words "before which the trial is had"; but the language used, "that if property stolen or embezzled," certainly presupposes a conviction, otherwise it would not be described after trial and acquittal as property stolen or embezzled; and for the further reason that if a conviction is not presupposed in said section, then the effect of the section would be to give the court the power to decide title to personal property in a summary way

where there had been no adjudication of either ownership or lack of ownership in any person. This is absurd. It follows then, that Sec. 2375 is to all intents and purposes equivalent to Sec. 4657 of the Iowa Code. Any other rule would be in direct violation of principles laid down by all of the authorities in cases where like advantage is sought to be taken of persons by depriving them of property on their persons by means of criminal process and then subjecting such property to civil process which could not reach the property while on the person of the defendant. The possession of the court, where money is taken from a person at the time of his arrest on a criminal charge, is wrongful (and therefore no advantage of that possession can be taken) if the person arrested is not guilty, and should be deemed the possession of the defendant for all purposes except those of the criminal case itself and the property should be as inviolate from seizure or disposal by or on any form of civil process as if it were in the personal possession of the defendant.

Fifth and Sixth Assignments.

These relate to the denial of the injunction *pendente lite*. There are two insuperable reasons why there can be no review on the merits of these assignments. *First,* no exception was taken in the lower court. (R. 35). Sec. 1055 Comp. L. of Alaska provides:

> "No exception need be taken or allowed to any decision *upon a matter of law* when the same is entered in the journal or made wholly upon matters in writing and on file in the court."

A ruling on the order to show cause why an injunction *pendente lite* should not be granted was not "upon a matter of law." That order was a discretionary order in the lower court and the court was thereby called upon to exercise his discretion under all of the facts and circumstances. The record (pages 10 and 35) shows that the lower court made the order on evidence then introduced. In other words, the ruling was a ruling on a question of fact or at least a mixed question of law and fact. It was therefore necessary to take an exception. It is too elementary to need a citation of authorities that where it is necessary to take an exception the appellate court will not review the ruling of the trial court where no exception was as a matter of fact taken.

Second, the evidence on which the district judge acted is not here. This court, as we have heretofore shown in our argument on the motions, has not before you the evidence on which the district judge acted and therefore cannot review the order.

In any event, the order made was purely discretionary. In *Southern Pacific Co. v. Earl,* 27 C. C. A. 185, this court, speaking of a similar assignment of error said:

"The decision of the judge who made the order will not be reversed unless it appears, after a consideration of all the evidence upon which his action was based, that his legal discretion to grant or withhold the order was improvidently exercised."

This decision is cited with approval in *Rahley v. Columbia Phonograph Co.,* 58 C. C. A. 639. How, under the state of the record here, could this court consider "all the evidence" upon which Judge Murane based his action? In *Vogel v. Warsing,* 77 C. C. A. 199, this court, speaking through Judge Gilbert, said:

"The granting or withholding of an injunction *pendente lite* ordinarily rests in the sound discretion of the court to which the application is made. It is not for this court to say whether it would have granted or withheld an injunction upon the showing which was made in the court below. We must recognize that upon that court was imposed the responsibility of the exercise of sound discretion upon the case as it was presented. Unless there has been a plain disregard of the facts or of the settled principles of equity applicable thereto, the exercise of the discretion of that court is not subject to reversal in this."

The only question before the appellate court in such a case is, as stated in *Fireball etc. Co. v. Commercial etc. Co.,* 117 C. C. A. 354: "Does the proof clearly establish an abuse of that discretion by the court below?" The proof not being here, this court certainly cannot say that there was any abuse of discretion. No one can contend that in *every* case in equity brought for the purpose of obtaining an injunction, it is an abuse of discretion for the trial court to refuse an injunction *pendente lite.* See also

Mitchell v. Colorado F. & I. Co., 117 Fed. 723;

Allen v. Pedro, 68 Pac. 99;

Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381;

Love v. Atchison etc. Co., 107 C. C. A. 403;

Henry Gas Co. v. U. S., 111 C. C. A. 612;

Kankakee v. American Water Supply Co., 118 C. C. A. 195.

Seventh Assignment.

This is the claim that the court erred in discharging the restraining order. In the first place, as we have heretofore shown, the restraining order

died a natural death on October 29, 1912. In the second place, the defendants were entitled as a matter of right to a dissolution of the restraining order when the court refused an injunction *pendente lite*. That the lower court should be affirmed is respectfully submitted.

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United States

Circuit Court of Appeals

For the Ninth Circuit

PIONEER MINING CO., Appellant, vs. JOHAN TIBERG and JOHN SUNDBACK, as Clerk, Appellees.	No. 2338.

Appellant's brief having been received subsequent to the printing of this appellee's brief, we make our answer thereto in this supplemental brief.

In the opening words of appellant's brief "This is an action in equity", and in the subsequent argument, particularly on page 9, the appellant char-

acterizes its own action, and, in effect, admits, as it did in the lower court, that the complaint does not state a cause of action at law. In other words, the lower court must be sustained unless the complaint is sufficient as a bill in equity.

The statement on page 3, "all other errors must stand or fall upon what this court holds relative thereto", referring to the ruling on the demurrer, is only one-half correct. Undoubtedly all other assignments of error fall if the court sustains the ruling of the lower court on the demurrer, but it does not follow that the other assignments of error, or any of them, ought to be upheld even though the court should reverse the lower court on the demurrer. For instance, it does not follow that because a complaint is good against demurrer, it is reversible error to refuse to grant an injunction *pendente lite*.

The allegation on page 4 "that Tyberg is insolvent and not an inhabitant of Alaska", indicates another reason why such complaints ought not to be favored. The complaint shows that Tiberg was arrested in the State of Washington and was forcibly taken to Alaska to stand trial on a criminal charge and that he is not an inhabitant of Alaska. Nevertheless, while he was in Alaska to answer this criminal charge, and before he had an opportunity to leave that jurisdiction, this suit

was commenced against him. This suit was brought, as the allegations of the bill show, under Sec. 1316 Comp. L. of Alaska. The applicable part reads:

> "No natural person is subject to the jurisdiction of the District Court of a district unless he appear in the court, or be found within the district, or be a resident thereof, or have property therein; and in the last case only to the extent of such property at the time the jurisdiction attached."

While it is true that Tiberg was then in the district, he was only there by virtue of superior force. The record of this court in the case of *Tiberg v. Warren,* 112 C. C. A. 596, shows how Tiberg came to be in Alaska. No advantage could have been taken of his presence under such circumstances for the purpose of making service of process upon him except for the fact that he had property within the jurisdiction. See *Holker v. Hennessey,* 39 L. R. A. 165 (167). Except for the property qualification of Sec. 1316 Comp. L. of Alaska, Tiberg could have objected to the jurisdiction of the court. *Greeley v. Lowe,* 155 U. S. 58, 39 L. ed. 69. However, by bringing the action under Sec. 1316, the plaintiff admitted that the property, by virtue of which the jurisdiction attached, was the property of Tiberg, or else the apparent jurisdiction was acquired by fraud. The appellant here is under the necessity of alleging in one breath that this property in ques-

tion was the property of Tiberg for jurisdictional purposes, but is not his property for all purposes in the case after jurisdiction attached. Having by this action admitted title in Tiberg, they ought not now be heard to deny it.

The allegation on page 4 that the only interest the clerk has, is to hold the fund for the benefit of the true owner subject to the orders of the court, is simply an incorrect legal conclusion. The clerk's duties in the matter arise from his official position. The fact as to how the money got into his possession is pleaded in the complaint. Legal conclusions are not admitted by demurrer.

Fogg v. Blair, 139 U. S. 118, 127; 35 L. ed. 104.

Kent v. Lake etc. Co., 144 U. S. 75; 36 L. ed. 352, 358.

The statement on page 5 that the complaint alleges that a lien should be declared on the proceeds is not accurate. The allegation of the complaint is that a lien has attached. (R. 29).

On page 6 the appellant attempted to state in one paragraph the allegations of the complaint which, in its opinion, is sufficient to state a cause of action in equity. In that paragraph, it recognized the necessity for a showing that the clerk would turn over this fund to Tiberg unless restrained, for it there says that the complaint alleges: "that

if the court did not restrain him (Tiberg) from receiving and the clerk from giving the property on deposit with him to Tiberg, Tiberg would regain possession of the property on deposit with the clerk of the court." There is no such allegation in the amended complaint. The only thing that approaches it is in paragraph XI (R. 28), in which nothing is pleaded except that Tiberg "will demand and claim said deposit" from Sundback and of the court unless restrained from so doing. The word "demand" certainly does not contain any implication of compliance by the clerk of the court. The word "claim" is defined as "a demand of anything that is in the possession of another." *Silliman v. Eddy,* 8 How. Prac. 122 (123). In other words, the terms "demand" and "claim" as used in the complaint, are synonymous.

The argument of appellant is not within the allegations of the amended complaint. On page 6, it alleges: "Where property is obtained from another by fraud, either through the crime of larceny, or other more complex manner of theft" a constructive trust arises. The complaint in this case does not plead either fraud or theft. The fifth paragraph alleges that Tiberg had the custody and care of certain property and that this he "wrongfully and unlawfully, and without the leave or consent of the plaintiff, took and carried away from said sluice boxes, * * * and converted the same to his own use, and has, ever since, failed and ne-

glected to account to the plaintiff therefor." This is nothing more than the usual allegation in an action of either replevin or conversion where the plaintiff claims that the original taking was wrongful. There is no allegation that Tiberg practiced any trick or artifice, or that he in any way acted in bad faith. For all that apppears on the face of the complaint, he may have carried away this property under a claim of right and title. In fact, the tenor of the entire amended complaint would indicate, and the express allegations of the original complaint show, that Tiberg does claim title. That the allegations of the amended complaint are not sufficient to constitute fraud, see 3 *Words & Phrases,* 2943. Neither is any larceny shown because there is no conviciton pleaded. As stated in *Holker v. Hennessey,* 39 L. R. A. 165 (170), "No one can justly be called a criminal until he be convicted of crime." The complaint only alleges that the criminal charge has been "adjudicated". The presumption is that the defendant in a criminal case is innocent. Therefore, the presumption must be, where the allegation is merely that the charge has been adjudicated, that he has not been convicted.

The appellant makes no claim that under the circumstances pleaded there can be any trust except where the fund is found in the hands of either "a voluntary assignee, a depository, or in the possession of anyone holding in bad faith." It is obvious that the clerk, under the circumstances, is neither

a voluntary assignee nor a person holding in bad faith. The appellant, therefore, concludes: "In this case the holding of the clerk must be treated as that of a depository for the true owner." We ask, On what authority? Appellant's evident argument is that because the clerk is not holding in either of the other two capacities, he must be holding as a depositary. That is, that the clerk must necessarily be holding in some capacity which will permit the appellant to impose a trust on this fund, and as there could be no valid argument that he is holding in either of the other capacities, he must certainly be holding as a depositary. We commend this for the inventive ability, though not for the logic, shown. The term "depository for the true owner" is a new creation. It seems never to have been used before appellant's brief was written. A depositary is a bailee in a contract of *depositum* and such a relationship may only be created by contract. 13 Cyc. 794, 795. There must be mutual assent by both the bailor and bailee. 9 Am. & Eng. Enc. L. (2d ed.) 283, 284. Before there can be a *depositum,* there must be a delivery. 13 Cyc. 795, 9 Am. & Eng. Enc. L. (2d ed.) 284. The consent of the delivering party, that is, in a contract of *depositum* the bailor, is necessary before there can be a delivery. *Rhodes v. School Dist.* 30 Me. 110. Official responsibility as a public officer does not create a contract of *depositum. Samuels v. McDonald,* 33 N. Y. Super. Ct. 211, 11 Abb. Pr. 344; 42

How. Pr. 360. In the last cited case, there was an attempt to hold immigration officers liable for the safe delivery of baggage on the theory that the duties cast upon them by law created a contract of *depositum,* which theory the court repudiated.

Appellant's brief does not contain a single case that is in point under the circumstances of this case. The decisions in *U. S. v. Carter,* involved nothing more than an attempt of an agent to make a secret profit for which he was held liable. The *Aetna Indemnity Co.* case, 131 N. W. 200, is not in point, as it there appears that there had been a conviction. The courts of Nebraska and New York have gone to some length with the constructive fraud doctrine. The courts of none of the other states have gone as far, but the courts of New York and Nebraska have not held that there can be any constructive trust where the defendant in a criminal case has been acquitted, that is, where no felony was, as a matter of fact, committed. While the correctness of the rule as laid down in the Nebraska and New York cases does not really concern us here, we call attention to the fact that this doctrine was doubted by the Supreme Court in *U. S. v. Bitter Root D. Co.,* 200 U. S. 451, 50 L. ed. 550 (563). In that case a bill was filed in equity for the purpose of recovering from the defendants the value of certain timber alleged to have been wrongfully cut and taken by the defendants and converted to their own use from the public lands belonging to the complainant (U.

S.) in the state of Montana. The bill alleged that the cutting and carrying away was without license, authority, or permission and was done in violation of both civil and criminal laws, and that by reason of certain frauds and conspiracies and complications which resulted therefrom, the complainant had no plain, adequate and complete remedy at law. Justice Peckham, in delivering the opinion, referred to the "liberal use in the bill in this case of averments in regard to fraud, conspiracy, and violation of trust, and in the course of the opinion, in answer to an argument that a fiduciary relationship existed of which equity would take cognizance, said:

> "The government contends that by reason of the duty of the Bitter Root Development Co. to keep true and accurate accounts and to monthly submit statements to the officers of the government, and by reason of its failure so to do, the proceeds of the lumber retained by it became in its hands a trust fund belonging to the complainant; that there was a pledge of this trust; its extent is in the defendant's knowledge; and in such cases choice of remedy is with the party aggrieved and he may proceed in equity for an accounting and pursue the fund. It is doubtful, to say the least, whether an obligation to report as to timber cut on the permitted lands constitutes any fiduciary re-

lationship between the licensees and the government, with regard to the alleged wrongful cutting of timber on other and separate lands."

In that case a demurrer to the bill was sustained. We think that this is at least an indication that the Supreme Court will not countenance such an extension of a constructive trust jurisdiction as is contended for in New York and Nebraska.

We have no fault to find with the argument that a legal remedy is not exclusive where there is a well-recognized prior equitable jurisdiction. The trouble with that argument is that it presupposes an equitable jurisdiction which does not exist in the case at bar.

In *Borchert v. Borchert,* 115 N. W. 35, the ground of equitable jurisdiction was rescision and cancellation of a contract. In other words, there was a separate, independent and well-recognized ground of equitable jurisdiction. That case is authority for the appellee.

Appellant goes far afield in trying to make the law respecting the right of a person injured by crime to bring a civil suit, before the termination of the criminal suit, apply to the case at bar. The statements quoted from *Cooley on Torts* and from the Florida case of *Williams v. Dickinson,* and the opinions in the cases cited, simply hold that when a crime gives rise to a cause of action in a civil suit,

the injured party does not need to wait until the criminal case is terminated before a civil suit can be brought. In other words, if A assaults and beats B, B can bring a civil suit for damages regardless of any criminal prosecution. That has nothing to do with the case at bar. Here the argument is that a constructive trust can be impressed upon certain property on the theory that that property was obtained by a felony, although no felony is pleaded. The only way that it could be established that a felony was committed would be a verdict of guilty. If there had been a verdict of guilty, the conviction would have been treated as an adjudication that the property belonged to the prosecuting witness. On no other theory can the summary power to dispose of property after conviction be upheld. It necessarily follows, therefore, that a verdict of acquittal is an adjudication that no felony of the described property was committed from the prosecuting witness. Appellant argues on page 12: "If then the offense against the dignity of the state need not first be disposed of, how can it be said that the question of either acquittal or conviction is pertinent in this case?" Why, then, did it plead that the criminal charge was "now adjudicated?"

On page 12, appellant claims that among the allegations necessarily admitted by the demurrer "are those of the larceny by Tiberg". As the complaint contains no such allegation, it follows that

there was no such admission. There is no allegation in the complaint that is not perfectly consistent with the taking by Tiberg under claim of right and color of title.

The case of *Lightfoot v. Davis* turns on a different point. In that case, the alleged thief was dead, so no personal judgment could be rendered, which fact the court points to as giving an equity court jurisdiction. The case is more in the nature of an accounting and does not decide that larceny alone raises a trust.

In *Jaffe v. Weld,* a demurrer to the complaint was sustained and the New York court there indicated an intention to at least limit the constructive trust doctrine in that state. The only holding in point here is that the proceeds of a draft cannot be followed. In *Bishop v. Howe,* a wife was seeking to set aside conveyances made by her to property purchased with funds embezzled by her husband, the conveyances having been made to prevent criminal prosecution. The court held that there had been no coercion and dismissed the bill on the ground that a just restitution had been made.

The *American Sugar Refining Co.* case is certainly not in point. That was a suit in equity under special circumstances to follow credits. Property had been procured by a vendee by fraud. This property he had sold so that the rescission of the contract did not furnish a complete remedy. But,

inasmuch as the vendor was entitled to rescind the contract while the property remained in the vendee's hands, it permitted the vendor to hold the money due the vendee on subsequent sales. This was a decision in the state court under a code and is scarcely applicable to an equity case in the Federal Court, but in any event the New York court there carefully limited the rule expounded, one of the limitations being that it ought strictly to appear that the plainitff has no adequate remedy at law. The case of *Holmes v. Gilman* involved a partnership. One of the partners purchased insurance with partnership funds. The court held that the policies belonged to the partnership. In *Bosworth v. Allen* an action was commenced against the directors of a corporation to compel them to account for secret profits made by them as the result of a conspiracy to wreck the corporation. The *Nebraska National Bank* case is not applicable because there was not in that case an acquittal and the argument of the court respecting constructive trusts where no fiduciary relationship existed, is certainly contrary to the ruling of the Supreme Court in the *Bitter Root Development Co.* case *supra.*

The argument on page 14 of appellant's brief is that the district judge assigned the wrong reason for his judgment. If that be conceded, a reversal does not necessarily follow. The judgment was right as we have shown in our opening brief,

and the correctness of the judgment is not affected by any reason assigned therefor.

The appellant, on page 8, suggests that the bill in this case "might be treated as in the nature of such motion or petition," referring to a motion or petition under Sec. 2375 Comp. L. of Alaska. The bill on its face, as well as the admissions made in appellant's brief, shows that this is a bill in equity. It certainly cannot be treated as a pleading in some other case between different parties.

Appellant seems to contend, on page 13, that the amended bill shows a fiduciary relationship prior to the claimed taking of the gold dust. This fact would in no way avoid the rule that the property must first be returned to Tiberg before it can be made subject to any process. Moreover, if there was a prior trust relationship, it cannot be assumed, and it is certainly not pleaded, that if Tiberg regains possession of this fund he will not apply it according to the trust. There is no allegation in the amended complaint as to what Tiberg will do with the property if he recovers it, and it is elementary that the court cannot assume that a man would not carry out his legal obligations. Again, if a shovel man in a mine can be such a trustee, one of Tiberg's duties as trustee is to reduce the trust fund to possession and recover it from persons wrongfully in the possession thereof. It would be unheard of for an equity court to hold that such is the duty of a trustee, but that the very

court which imposes such duty will restrain him from doing his duty. The fact is that the added allegation to the amended bill is a palpable attempt at evasion and that the conclusions therein are negatived by the bill taken as a whole.

In the last paragraph of appellant's brief, it argues, in effect, that appellant was entitled to an injunction, if it had a right to maintain the action, and asks the court to reinstate "the injunctional order". There never was an injunction. There was only a temporary restraining order that certainly cannot be continued indefinitely and there is no authority for the proposition that an injunction is a matter of right, if a bill in equity is good against demurrer. Their major premise is not stated. The minor premise is: The bill is good against demurrer. The conclusion is: Therefore an injunction should be granted. The only major premise which would logically permit of this conclusion is: An injunction should be granted in every case in which the bill is good against demurrer. This court, in common with all other courts, having held to the contrary, we need not pursue the subject further.

Respectfully submitted,

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PIONEER MINING COMPANY,
a corporation,
Appellant,

vs.

JOHN TIBERG, et al.,
Respondents.

APPELLANT'S REPLY BRIEF ON MOTION TO DISMISS AND ON MERITS.

I.

The respondent's first motion is to dismiss the appeal on the grounds:

(A) That under Secs. 1336 and 1337 of Compiled Alaskan Laws and under Sec. 5 of the Act of March 3, 1891, creating the Circuit Courts of Appeal, this appeal should have been taken to the Supreme Court because a constitutional question is involved, either in the construction or application of the Constitution.

(B) Because transcript is not properly certified.

(C) Because record before the Court shows, among

other things, an attempt to review an order dissolving a restraining order and denying an injunction *pendente lite* without including in record evidence and affidavits used on hearing.

(A) *No appeal lies to the Supreme Court in this case.*

No appeal to the United States Supreme Court lies in this case under Secs. 1336 and 1337 of the Compiled Laws of Alaska as claimed by appellee, because there was involved in the judgment no question of the "construction or *application* of the Constitution of the United States."

The judgment followed the order sustaining the demurrer to the amended complaint, and any question of "construction or application of the constitution" which can be said to have been determined by the judgment must be found to necessarily inhere in the Court's decision of the demurrer. The demurrer was general and not special, and the claim made, namely, that the complaint did not state facts sufficient to constitute a cause of action, manifestly could not raise any question of "construction" of the Constitution.

The sole contention must then be that the general demurrer raised a question of the "application" of the Constitution—that is, that the facts alleged in the amended complaint, if read and considered in the light of the Federal Constitution, did not show that the plaintiff was entitled to the relief demanded.

Can it be said in this case that some provision of the Federal Constitution alone must bar plaintiff's right to recover under the facts pleaded?

The answer must be in the negative, because:

First—The Fourth Amendment as to unreasonable searches and seizures is held to apply only to criminal cases and to have no application to civil proceedings.

> *Den* vs. *Hoboken Land Co.,* 18 How., 274;
> *Matter of Meador,* 16 Fed. Cas. No. 9375;
> *In re Strouse,* 23 Fed. Cas. No. 13,548;
> 1 Sawyer, 605;
> *United States* vs. *Boyd,* 116 U. S., 633.

It appears from the complaint, it is true, that a crime had been committed and the criminal proceeded against by appropriate criminal proceedings, but nothing transpiring in those proceedings which might raise a question under the Fourth Amendment can make the Amendment a bar in proceedings subsequently instituted to determine the civil rights of the parties interested.

United States vs. *Stone,* 167 U. S., 178. It must follow that the Fourth Amendment can have no proper application to the facts alleged in the complaint and raise no possible issue under a general demurrer thereto.

Second—But if the foregoing reason were not sound and if the Fourth Amendment may be said to apply

to the facts pleaded in the complaint, no issue as to such application can be raised by a general demurrer, in that, the immunity guaranteed is as against "unreasonable" searches and seizures and its violation can only be determined in view of all the circumstances of the particular case.

Mason vs. *Rollins,* 2 Biss., 99; 16 Fed. Cas. No. 9,252.

If mere "search or seizure" were the *sine qua non* of the Amendment it might be reasonably contended that its "application" to a given state of facts might be determined as a matter of law.

But inasmuch as the guaranteed immunity is as against "unreasonable" searches and seizures, any question as to its violation must be raised by plea or answer rather than by demurrer in that it is necessarily a mixed question of law and fact.

It is submitted that the facts alleged in the complaint concerning what is claimed to be a violation of the Amendment are not so circumstantial as to warrant a judicial conclusion that there had been an *"unreasonable search or seizure."*

Third—The immunity guaranteed by the Fourth Amendment is as much a personal privilege as that guaranteed by the Fifth Amendment in respect to a defendant in a criminal case being compelled to testify against himself, and being purely a matter of personal privilege and therefore capable of being

waived, it must be claimed or asserted before it can become effective.

If the Fourth Amendment by its application to the facts here pleaded will raise a bar to recovery, then certainly an assertion of its violation by defendant is necessary to the presentation of such an issue.

Surely a general demurrer is not enough to present such an issue of confession and avoidance as is contended for by respondents.

As to the intimate relation between the Fourth and Fifth Amendments the United States Court said in *Boyd* vs. *U. S.,* 116 U. S., 633:

> "They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth *Amendment, throws light on the question as to what is an* 'unreasonable search or seizure' within the meaning of the Fourth Amendment."

It has never been disputed that the Fifth Amendment as to compulsory testimony becomes effective only upon a claim of the privilege of immunity. It has never been denied that the privilege of immunity could be waived.

From the Court's expression in *Boyd* vs. *United States,* given above, it is manifest how inapplicable the Fourth Amendment is to a civil case.

The question of immunity here raised under the Fourth Amendment could not even have been raised in the criminal case referred to in the complaint, for it is the settled law that the use of the subject of such a search and seizure for evidential purposes does not violate the constitutional guaranty.

Adams vs. *New York,* 192 U. S., 597;
Bacon vs. *U. S.,* 97 Fed., 40.

Fourth—Even if a question of constitutional construction or application were present in the decision on the demurrer and the judgment which followed, the United States Supreme Court would refuse to assume jurisdiction to review.

1. Because the question, if present at all, was only incidentally involved and not directly drawn in question.

Blythe vs. *Hinckley,* 173 U. S., 501;
Kittaning Coal Co. vs. *Zabriskie,* 176 U. S., 681;
Arkansas vs. *Schlierholz,* 179 U. S., 598;
Richards vs. *Mich. R. Co.,* 186 U. S., 479;
Chapin vs. *Fye,* 179 U. S., 127;
Loeb vs. *Columbia Town Trustees,* 179 U. S., 472.

2. Because it does not appear that the question was

not only present directly, and not incidentally, but was controlling as well.

Empire etc. Co. vs. *Hanley,* 205 U. S., 225, 232;
In re Lennon, 150 U. S., 393;
Carey vs. *Houston etc. Co.,* 150 U. S., 170;
Commercial Bank of Rochester vs. *City of Rochester,* 15 Wall., 639-642;
Cosmopolitan M. Co. vs. *Walsh,* 193 U. S., 460.

3. Because it does not appear that the question of the construction or application of the Constitution, as directly involved and controlling in its effect, was distinctly presented for decision in the trial court.

Empire etc. M. Co. vs. *Hanley,* 198 U. S., 292, 298.

We shall argue "B" and "C" together.

B. and C. The certificate of the clerk, while not strictly in form, is sufficient and the transcript contains all that is "necessary to a hearing in this court."

A consideration of the transcript in detail and of the Bill of Exceptions will show that the certificate covers all the record of the proceedings below necessary in the hearing of this appeal.

Before arguing this proposition we may be pardoned for digressing a little from the sequence of the numer-

ous motions presented by counsel, to dispose of the fourth motion, namely, that to strike the Bill of Exceptions.

Counsel betrays a lack of familiarity with the provisions of the Alaska code, which doubtless accounts for this futile motion, and attempt thereby to convict counsel for appellant of unfair dealing with the Court.

Section 1055 of the Code of Civil Procedure of Alaska (Carter Code, Sec. 223) provides:

> "The statement of the exceptions, when sealed and allowed, shall be signed by the Judge and filed with the Clerk and thereafter it shall be *deemed and taken to be a part of the record of the Court.* No exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal or made wholly upon matters in writing and on file in the Court."

The Bill of Exceptions is therefore a part of the *record* on this appeal.

Sutherland vs. *Pearce,* 186 Fed., 783.

And such Bill of Exceptions imports verity and we cannot look beyond the record to impugn the same. Certainly this cannot be done by affidavits filled in the Appellate Court.

Moss vs. *Gulf Compress Co.,* 202 Fed., 659;
Bank vs. *Eldred,* 143 U. S., 293, 36 L. Ed., 162;
Honey vs. *Railroad Co.,* 82 Fed., 773;
Rollins vs. *Board,* 78 Fed., 741;
Case vs. *Hall,* 94 Fed., 300, 302;
First National Bank vs. *Wilder,* 100 Fed., 223.

To appreciate the significance of this fact as applied to the case at bar, we call the attention of the Court to the Bill of Exceptions (Tr., 36):

> "By way of provisional remedy plaintiff sought an injunction *pendente lite*. In the latter proceedings an order to show cause why the injunction should not be granted was made and returnable at a time and place designated and defendant Tiberg was, by said order in the meantime and *until the further order of the court* restrained from demanding or receiving said proceeds. . . . Judgment of dismissal of the action . . . was thereupon, plaintiff electing to stand on its complaint on the 18th day of August, 1913, entered, . . . In the injunction proceedings above mentioned, *the demurrers to the original and amended complaints having been sustained and the plaintiff electing not to plead over, the plaintiff's motion for injunction pendente lite was,* on the 18th day of August, denied and the restraining order theretofore issued dismissed; to all of which the plaintiff duly excepted and exceptions were allowed . . ."

This Bill of Exceptions proposed was presented to and was accepted by the appellee. No exceptions appear to have been taken to its form or substance. And thereafter the Court below approved, allowed and settled the same as "correct in all respects" and made it "a part of the record" (Tr., 38).

There can be no other construction of the language of the Bill of Exceptions than that the action of the Court below in overruling the motions for an injunction *pendente lite* was based and could only have

been based, not upon any evidentiary matters before it, but upon the fact that having overruled the demurrer to the amended bill and dismissed the action for lack of equity, there was therefore nothing before the Court on which to maintain an injunction *pendente lite*. For this reason no evidence was offered, nor does the record in any respect show that any evidence was offered or could legally have been considered by the Court on the ancillary motion. It is true there is a statement taken from the minutes of the Court (Tr., 35) that on the hearing of the motion for the injunction *pendente lite* on August 18th, "Atty. G. J. Lomen on behalf of plaintiff filed the affidavit of Lewis Stevenson" and "the deposition of defendant Johan Tiberg was ordered published." The motion was submitted without argument.

But there is nothing in the record to show that the affidavits or the deposition were read or considered by the Court in deciding the ancillary proceeding or that any other affidavits were introduced in evidence or filed. And the bill of exceptions certainly is authority to the contrary, i. e., that no evidence was used on the hearing but that the Court *ipso facto* by reason of the judgment of dismissal of the complaint, denied the motion, and dissolved the restraining order.

Where a case is disposed of by demurrer to the bill, the evidence on file is not necessary to a hearing of the appeal.

Missouri, Kansas & Texas R. R. Co. vs. *Dinsmore,* 108 U. S., 640; 27 L. E. P., 640.

There is no merit therefore in any of the motions directed to the striking of the transcript in the appeal from the order denying the injunction *pendente lite* based on the ground that there has been an omission of evidence from the record. The Clerk in following the praecipe of counsel for appellant (Tr., 48) regarding the making up of the record had no discretion to exercise in the matter because in carrying out such instructions he could do no more than he did actually do,—send to this Court a full, complete and true transcript of the proceedings in the court below "necessary to a hearing in this Court" under its rules.

To return to the certificate. Assuming for the purpose of the argument, that the affidavits and deposition referred to were entitled to have been made a part of the transcript here as having been introduced in evidence below, we submit that the sixth motion of appellee, viz: for a diminution of the record, would have been productive of all that he desired in that respect (should this Court grant the same which under the legal aspect of the case asserted by us, it would be error to do), without beclouding the real issue presented to this Court by a multitude of argumentative motions covering some sixty pages of printed matter.

The power of this Court to dismiss an appeal for an inherently defective certificate or transcript or for a failure to file the transcript in the manner or within

the time prescribed by the statute and the rules is admitted, but it is a power that the Court hesitates to exercise when the rights of all the parties may be preserved by less drastic measures.

In one of the cases cited by appellee, viz: *Idaho & Oregon Land Improvement Co.* vs. *Bradbury,* 132 U. S., 509, 518; 33 L. Ed., 433, where the certificate was not even signed by the Clerk, the Supreme Court in refusing to dismiss on that ground, say:

> "In support of this motion reliance is placed on *Blitz* vs. *Brown,* 7 Wall., xxx, in which the only certificate of authentication was a blank form wanting both the seal of the Court below and the signature of the Clerk so that there was really no authentication whatever and this Court therefore dismissed the writ of error, but permitted the plaintiff to withdraw the record for the purpose of suing out a new writ. But in the case at bar the certificate not only begins with setting out the name and office of the Clerk as the maker of the certificate, but has appended to it the seal of the Court and lacks only the Clerk's signature to make it conform to the best precedents. The question is not one of no authentication, but irregular or imperfect authentication; *not of jurisdiction but of practice.* It is therefore within the jurisdiction of this Court to allow the defect to be supplied."

In the case of *Burnham* vs. *North Chicago St. Ry. Co.* (C. C. A., 168), where a necessary part of the record had been omitted from the transcript and was subsequently presented duly certified to the Court of Appeals, it was held to be made a part of the record

by a direct order without requiring certiorari. The Court after holding that the jurisdiction attached by the filing of the writ of error said:

> "The objection that the transcript is not authenticated as a full and complete transcript but only as a 'true and correct transcript from the filing of the mandate' issued from this Court on a former appeal does not affect the jurisdiction, which as the cases show, attached upon the filing of a writ of error in the office of the Clerk of the Circuit Court."

And referring to *Redfield* vs. *Parks,* 130 U. S., 623, 32 L. Ed., 1053, a case relied upon by appellees to sustain the motion to dismiss, said:

> "In *Redfield* vs. *Parks* there was a like objection to the authentication of the transcript but more than three years having elapsed before the motion to dismiss was entered and the case having been submitted on both sides on the merits, the Court gave leave to the plaintiff in error to sue out a certiorari to bring up the papers omitted from the transcript. *Jurisdiction cannot be conferred by agreement and if the proper authentication had been essential to jurisdiction in that case it could not have been waived by filing briefs or otherwise."*

In view of the only conclusions either of law or fact to be drawn from the record including the minutes of the Court, of August 18th, relative to the denial of the injunction *pendente lite,* i. e., that no evidence was or could have been considered by the Court in determining the motion whatever affidavits may have been filed or deposition published at the time, we quote again

the pertinent language of the Court from the case last cited:

> "While this disposes of the motion to dismiss . . . we deem it proper here besides calling attention to the remarks of the Chief Justice in *Railway Co.* vs. *Stewart,* 95 U. S., 279, in respect to what should be contained in the transcript to say that the words 'all proceedings in the case' as used in the first clause of Rule 14 of this Court . . . are to be interpreted with reference to the words *'all the papers, exhibits, depositions and other proceedings which are necessary in the hearing in this Court'* found in the third clause of the Rule. *It is not intended that irrelevant papers, proceedings or orders shall be certified;* and that the clerk may not be left in doubt, he may well require of the counsel or attorney of the appellant or plaintiff in error in the cause, a praecipe stating specifically what the transcript shall contain and attaching a copy of the praecipe to the transcript, certify that it is a true and correct transcript according to the praecipe."

Practically what was done in the case at bar. The certificate shows that the Clerk had received a praecipe for the transcript from the counsel for appellant, followed and embodied it in the record forwarded to this Court.

In the case of *Meyer* vs. *Mansur & Tebbets Imp. Co.,* 85 Fed., 874, 29 C. C. A., 465, cited by appellees, no such praecipe is shown and the Court there inferentially held that if there had been such a praecipe its action might have been different, it says:

"It must be borne in mind that in this case there is neither a certificate of the Clerk attesting a full transcript nor a stipulation of the parties as to what documents shall constitute the necessary papers, *nor a statement by the Clerk that he was guided by the appellant's solicitor in selecting the papers necessary to constitute the transcript.*"

An examination of the balance of the cases cited by counsel will show that they are not in conflict with the rule which we state as to the authentication of the record or the procedure generally followed by the Appellate Court in the absence of negligence or indifference on the part of the appellant, namely, that the appeal will not be dismissed but the defects permitted to be rectified by a certiorari or otherwise.

Flickinger vs. *First National Bank,* 145 Fed., 162;

Hudgins vs. *Kemp,* 18 How., 350; 15 L. Ed., 511, 514;

Missouri, K. & T. R. R. Co. vs. *Dinsmore,* 108 U. S., 30; 27 L. Ed., 640;

State of Kansas vs. *Meriweather, et al.,* 171 Fed., 39.

The cases referred to by counsel where there has been a dismissal were extreme ones.

In *Blitz* vs. *Brown,* there was no certificate and the case was dismissed.

In *Keene* vs. *Whittaker,* the case had gone to the Supreme Court on an agreed statement of facts and in

the absence of "any of the proceedings in the Court below being in the record" the case was dismissed.

In the case of *Grigsby* vs. *Purcell,* the appeals were not docketed nor was any transcript filed during the term to which the appeal was returnable.

In the case of *Ray* vs. *Law,* the appellant having been refused an appeal below, on the ground that his decree was not final, applied to the Supreme Court, to allow the appeal and order the Court below to send up the record, at the same time producing "sundry papers purporting to be the substance of the record but not properly authenticated." The Court refused to do anything without seeing the record and held the papers offered could not be considered as such. There is nothing to show in this opinion of one paragraph, as to what this record consisted of. The decision is of no value whatever on this point.

The same thing must be said of *Campbell* vs. *Reed.* No certificate at all was shown there.

We quote the language of the Court in the Case of *Ruby* vs. *Atkinson,* another of the cases cited by appellees to support their motion:

> "The clerk's certificate to the alleged transcript is insufficient. It is limited to the correctness of the pleadings, omits all reference to the decrees or orders of the Court and the proceedings to bring up the case on appeal and only certifies the evidence as furnished by the counsel for appellants, 'which is said by him to be agreed upon by counsel for both parties'."

The Court, however, dismissed the appeal for another reason entirely, namely, that no citation of appeal was issued to one of the principal defendants.

It would be a useless waste of the time of the Court for us to criticize further the cases cited by appellees.

Practically the only substantial objection made to the certificate and to the transcript (when the objections of the appellee are analyzed), is that neither the certificate nor the transcript discloses that the evidence alleged in the affidavits filed on these motions to have been presented on the hearing of the motion for injunction *pendente lite,* were included.

We submit that while the form of the Clerk's certificate might have more technically complied with the statute, still it substantially met the requirements thereof. It discloses every document necessary to a hearing of the appeals pending before this Court, and states that they are true and exact transcripts "as appears from the records and files in his office"; it discloses that the same was made upon the praecipe of appellant's counsel for the transcript and the record embodies a copy of this praecipe and the certificate is signed by him as Clerk under the seal of the Court.

Upon the foregoing points we maintain finally:

(a) That such evidence was not and could not legally have been considered by the Court below in deciding such motion, even if it were before the Court. If the bill does not state a cause of action to give the

Court jurisdiction, certainly no evidence offered on the ancillary hearing could do so.

(b) That the bill of exceptions is conclusive on this point.

(c) That the decision sustaining the demurrer and dismissing the bill was decisive on the motion for injunction *pendente lite,* and such evidence, even if introduced on the hearing, would not be necessary to a hearing in this Court (*Missouri, K. & T. R. R. Co.* vs. *Dinsmore, supra*) under the rules. If the complaint did not state a cause of action for an injunction and the Court had dismissed the same for that reason, then no evidence we could offer on the order to show cause would be available to show to this Court that we were entitled to an injunction or that we were not entitled to an injunction. This is elementary. Therefore the transcript is complete.

(d) If by any possibility this Court should hold we are wrong in this, which we emphatically doubt, then we maintain that we have shown by the record our good faith in giving to the Clerk the praecipe for the transcript from our understanding of what was necessary on the appeal and the transcript as sent up by him was prepared in good faith; and if this Court holds the same to be defective it is not through any negligence or indifference shown on our part, but rather from a desire to avoid the expense and unnecessary cumbering of the record with the printing of

useless papers. Under such circumstances appellees should be confined to their writ of certiorari for a diminution of the record.

State of Kansas vs. *Meriweather,* 171 Fed., 39.

II.

The Supersedeas was rightfully granted.

The Court had an inherent right, while sitting in equity to maintain the *status quo* until a decision of the Appellate Court could be had in the matter.

Merrimack River Savings Bank vs. *Clay Center,* 219 U. S., 55; L. Ed., 32;
Hovey vs. *McDonald,* 109 U. S., 139;
U. S. vs. *Stone,* 187 Fed., 850, 857;
Western Union Tel. Co. vs. *Wright,* 168 Fed., 557;
Cotting vs. *Kansas City Stockyard Co.,* 82 Fed., 850, 857.

In the case of *Merrimack River Savings Bank* vs. *Clay Center, supra,* where the bill was dismissed on demurrer, the United States Supreme Court say:

> "The plain purpose of the order continuing the injunction pending this appeal was to preserve the subject matter of the litigation until the rights of the complaint could be heard and determined. It is well settled that the force and effect of a decree dismissing the bill and discharging an injunction is neither suspended nor annulled as a mere con-

sequence of an appeal to this Court even if a supersedeas is allowed. . . .

"That the Circuit Court to the end that the *status quo* might be presented pending such appeal had the power to continue an injunction in force, *by virtue of its inherent equity power* is not doubtful."

Citing the case of *Hovey* vs. *McDonald,* and the *Slaughter House cases,* 10 Wall., 273.

In the case of *Western Union Telegraph Co.* vs. *Wright, supra,* the bill also was dismissed and a temporary *restraining* order was dissolved, but the Court allowed a supersedeas. So too, in *Cotting* vs. *Kansas City Stockyards Co. supra,* the same action was taken.

Admitting all of appellee's contentions as to no appeal being permissible from either the restraining order or from the order dissolving the same, we are still here on an appeal from the order denying the injunction *pendente lite.*

It is immaterial that there was not in terms a temporary restraining order in existence at the time of the making of the *status quo* order. It is undisputed there was a restraining order until the hearing of the order to show cause and "the further order of the Court" (Tr., 10-11). And the record shows that there was a hearing on the order to show cause on August 18th, 1913.

The minutes of the Court of that day state that "the preliminary restraining order heretofore issued

herein be dissolved," and upon motion of G. J. Lomen, counsel for plaintiff, "it was ordered that the prop- "erty in controversy in the action remain in *statu quo,* "to wit: in the hands of the Clerk for the present and "*until the further order of the Court*" (Tr., 35-6).

This is further confirmed by the Bill of Exceptions which recites that the "motion for injunction *pendente* "*lite* was on the 18th day of August denied and the "restraining order theretofore issued, dismissed . . . "on motion of plaintiff and notice of appeal being "given, the Court thereupon fixed the amount of the "supersedeas bond at $3,000, and ordered the pro- "ceeds aforesaid to be held in *statu quo subject to* "*the further order of the Court*" (Tr., 37).

It is therefore clear that the restraining order was in the contemplation of all parties to the record in full force up to August 18th, 1913, when it was dismissed and the notice of appeal being given, the Court substituted the *statu quo* order which was in itself a re-instatement of the restraining order pending the perfecting of the appeal.

United States vs. *Stone,* 187 Fed., 579.

This was followed by the petition for the allowance of the appeal, on October 9, and the order allowing the same and fixing the amount of the supersedeas bond on the same day, the Court used the following language:

"It is further ordered that upon the filing of

said bond (for $3250) the order heretofore made (the order above referred to of August 18th) directing the trust fund involved in said action to remain in *statu quo* in the hands of the Clerk of said Court be, and the same is hereby continued pending said appeal and the further order of the Court" (Tr., 44).

This order was, under the decisions cited, within the inherent equity power of the Court to make.

Considerable weight is placed by counsel in the *statu quo* order being void, because, as they allege, there was no notice given to Tiberg, or process served. Their contention is that under the Alaskan code, having demurred, this constituted an appearance and he was entitled to twenty days' notice thereafter of all proceedings including the time appointed for the hearing of the *statu quo* order.

Both the *statu quo* order of August 18th and that of October 9th, were made in *open Court.* The record being silent on the point of whether there was no notice, or whether appellee was not represented, and the orders having been made, every presumption must be indulged in favor of the jurisdiction of the Court to make the orders.

The District Courts of Alaska are courts of general jurisdiction and are within the rule that such courts, in the absence of a showing to the contrary in the *record,* have proceeded within the general scope of their powers and that their orders and judgments have been given with authority.

Nelson vs. *Meehan,* 155 Fed., 1;
Equitable Trust Co. vs. *Fowler,* 141 U. S., 384;
Stocksloger vs. *U. S.,* 116 Fed., 590;
Galpin vs. *Page,* 18 Wall. (U. S.), 350.

Says Mr. Justice Field, in *Galpin* vs. *Page, supra:*

> "It is undoubtedly true that a Superior Court of general jurisdiction proceeding within the general scope of its powers is presumed to act rightly. All intendments of law in such a case are in favor of its acts.
>
> "It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not alone of the cause or subject matter of the action in which the judgment is given, *but of the parties also.*"

This presumption of jurisdiction by notice to Tiberg applies to the proceedings in Court on the allowance of the appeal and the fixing of the undertaking and granting of the supersedeas (if notice could be deemed necessary), as well as on the 18th of August, when the original *statu quo* order was made. And is equally applicable to its jurisdiction to hear the order to show cause.

If appellee felt himself aggrieved by the failure to hear the order to show cause on the original day set, his remedy was to move to dismiss the restraining order at any time thereafter, or to have had the Court fix a bond. He cannot now be heard to complain because he acquiesced in the action of the Court.

So far as the amount of the bond on appeal is concerned, that was a matter within the discretion of the lower Court, and counsel should have moved the Court below to increase the same if he felt it was insufficient.

Rose's Federal Procedure, Vol. 2, Sec. 2014;
Section 1000, R. S. U. S.;
Jerome vs. *McCarter,* 21 Wall., 17; 22 L. Ed., 515.

In the case cited, the Supreme Court, after affirming this rule, say:

". . . where the judgment or decree is for the recovery of money . . . or where the property is in the custody of the marshal under admiralty process . . . or where the *proceeds thereon or a bond for the value thereof is in the custody of the Court,* indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property and the costs of suit and just damages for the delay and costs and interest on appeal . . ."

This, of course, is subject to the modification that where *after* appeal, facts arise which show that the character of the security has changed, and is not as good and sufficient as when the original order was made, this Court may require additional security. No such condition is shown to exist here.

The final motion, i. e., for diminution of the record, is, we think, covered by what we have said relative to

the motions to strike the transcript and to dismiss the appeal on the ground that the certificate of the Clerk and the transcript do not comply with the statute.

ON THE MERITS.

We discussed in our opening brief the main point in this case as we see it, i. e., whether or not a constructive trust may be impressed upon the proceeds of stolen property when found and identified, and whether such trust was shown by the allegations of our amended bill. We shall make no attempt to again go over that ground, but refer the Court to the brief and as briefly as possible will answer some of the voluminous arguments of appellee on the other propositions advanced in his briefs.

And preliminary thereto let us assert that no attempt is made to press assignment of error one on behalf of appellant.

It is elementary that the filing of an amended complaint supersedes the original. Notwithstanding the argument of counsel to the contrary, we rely upon the error of the Court below in dismissing the action based upon the amended complaint. The amended complaint is neither inconsistent with the original nor does it change the cause of action. The main purpose of both complaints is the same, i. e., to establish a constructive trust in the proceeds of the alleged stolen gold; the transaction alleged in both complaints is the same, the theft of the gold and its conversion

into the trust fund. The amended bill contains a prayer for general relief and a court of equity having obtained jurisdiction for one purpose will give the relief found applicable upon a hearing of all the facts.

Jones vs. *Van Doren,* 130 U. S., 684, 32 L. Ed., 1077;

Brainard vs. *Burk,* 184 U. S., 104, 46 L. Ed., 453.

We submit that:

The proceeds of the stolen property being in the custody of the Clerk of the Court is no bar to the creation of a constructive trust therein, as his possession was in fact Tiberg's possession.

Appellant was entitled to invoke the equitable jurisdiction of the Court and to preserve the *status quo* of the proceeds of the stolen property until it could be determined whether appellant was equitably entitled thereto.

Is the fact that the Court on its law side, through its Clerk, has the possession of the proceeds of the stolen property, to be set up as an aid to the thief to defeat the right of the equitable owner of the property to sustain the bill herein, showing as it does the existence of a constructive trust in other respects? That is the argument of the respondent. It is claimed that the Court below sitting as a criminal court, notwithstanding that such Court is the identical Court, judge and

clerk in the equitable action, having first obtained jurisdiction over and the custody of these proceeds of stolen property to be disposed of in whole or in part to the true owner, has its hands tied on its equity side, so far as exercising any act of jurisdiction over such proceeds in the case at bar and that, too, after the termination of the criminal proceeding. Such cannot be and is not the law.

> "Equity impresses a constructive trust upon the new form or species of property not only while it is in the hands of the original *wrongdoer but as long as it can be followed and identified in* WHOSESOEVER HANDS *it may* COME."
>
> *Pomeroy's Eq. Jur.,* Secs. 1051, 1053, Vol. 3; Cases cited, Opening Brief, pp. 13-20.

There is no exception to this rule laid down in the text or in the decisions, other than where it is found in the hands of *"a bona fide* purchaser *for value and without notice."*

It would be an anomaly in the law that implied exceptions to this rule should as contended by appellee exist; that such constructive trust shall not be impressed upon stolen property or proceeds thereof when it enters into the custody and control of the law, and especially under the circumstances shown by this bill, where, as we are willing to admit, they are being held by the Clerk for return to Tiberg. That the very power which declares that "wherever one person has " wrongfully taken the property of another and con-

"verted it into a new form . . . the trust arises "and follows the proceeds," does so with the reservation that such rule does not apply where the law has temporarily obtained its control or custody. No such reservation can be read into the law.

In such event the law itself would be providing a means to the thief to cheat the owner instead of a means to the owner to be placed in possession of his own.

> "In contriving means to cheat an owner out of his property, a thief should not be permitted to outstrip the courts in discovering a remedy to restore it when found."
>
> *Aetna Indemnity Co.* vs. *Malone,* 131 N. W., 200.

The fact that the amended bill does not show whether Tiberg was acquitted or not is immaterial.

Appellee objects that the amended bill does not show whether Tiberg had been convicted or acquitted and insists that in the absence of any allegation showing that Tiberg had been convicted that the presumption of his innocence of the larceny prevails and should apply in the civil action for the injunction between Tiberg and third parties; that therefore the bill cannot be maintained on its face, said presumption being read into it.

Whatever presumption of innocence was applicable in the criminal proceeding can have no application

in this independent civil proceeding between Tiberg and the appellant. A new presumption may possibly arise, namely, that every man is presumed to act honestly in his dealings, and to establish our case on the trial it will be necessary that the evidence be strong enough to overcome this presumption.

But even conceding the presumption of innocence of the crime of larceny as urged in our bill, and admitting Tiberg was acquitted, that would not prevent our pursuing our civil remedy against him, nor would it do so had we formally alleged his acquittal in the criminal proceeding. It hardly needs citation of authority to establish this. The Supreme Court of the United States has many times held to the contrary.

In the case of *Coffey* vs. *U. S.,* 116 U. S., 436-445; 29 L. Ed., 684, a libel was brought against certain personal property as being forfeited to the United States on account of the violation of certain sections of the Revised Statutes, and the defendant filed claim to the property and answered, setting up as one of the defenses that before the institution of the proceedings for the forfeiture a criminal information had been filed in the same court, based upon certain of the Revised Statutes, upon which the forfeiture proceedings were founded, and that the same charges in the criminal information were practically embraced in the matters set out in the libel against the personal property and that he had been acquitted upon the criminal information.

A demurrer was sustained to this part of the answer on the ground that the facts stated were not sufficient to constitute a defense, but the Supreme Court held that the demurrer admitted the fraudulent acts alleged in the criminal information, covered by the verdict and having embraced all the acts alleged in the libel for the forfeiture, the judgment of acquittal in the criminal case was a bar to the proceeding in the criminal.

It was urged on the appeal that the acquittal in the criminal case might have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt and that on the same evidence on the question of preponderance of proof a verdict might be obtained for the government in the action *in rem,* but the Court held that so far as the United States was concerned, the fact or act had been put in issue and determined against it and all that is imposed by the statute as the consequence of guilt is the punishment therefor. There could be no new trial of the criminal prosecution and that a subsequent trial of the civil suit by the United States amounted to substantially the same thing with the difference only in the consequences following to the defendant. *But,* said the Supreme Court:

> "When an acquittal in a criminal prosecution in behalf of the Government is pleaded or offered in evidence by the *same defendant in an action against him by an individual, the rule does not apply* for the reason that the parties are not the

same, and often for the additional reason that a certain intent must be proved to support the indictment which need not be proved to support the civil action."

In the case of *Stone* vs. *U. S.*, 167 U. S., 186; 42 L. Ed., 177-8, the Supreme Court went further. This was an action brought to recover the reasonable value of certain timber cut on lands of the United States. The defendant Stone set up as a defense the fact that he had been tried and acquitted on an indictment brought by the United States for cutting the same timber from the lands, under Revised Stats., Sec. 2461. In holding that the United States could maintain the action and in distinguishing the Coffey case, the United States Supreme Court say:

"The rule established in Coffey's case can have no application in a civil case not involving any question of criminal intent or forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of property. In the criminal case the government sought to punish a criminal offense, while in the civil case it only seeks in its capacity as owner of property, illegally converted, to recover its value. In the criminal case his acquittal may have been due to the fact that the government failed to show, beyond a reasonable doubt, the existence of some fact essential to establish the offense charged, while the same evidence in a civil action brought to recover the value of the property illegally converted might have been sufficient to entitle the government to a verdict. Not only was a greater degree of proof requisite to support the indictment than is sufficient to sustain

a civil action, but an essential fact had to be proved in the criminal case, which was not necessary to be proved in the present suit. In order to convict the defendant upon the indictment for unlawfully, wilfully, and feloniously cutting and removing timber from lands of the United States, it was necessary to prove a criminal intent on his part, or, at least, that he knew the timber to be the property of the United States. . . . But the present action for the conversion of the timber would be supported by proof that it was in fact the property of the United States, whether the defendant knew that fact or not. . . . An honest mistake of the defendant as to his title in the property would be a defense to the indictment, but not to the civil action. . . . It cannot be said that anything was conclusively established in the criminal case, except that the defendant was not guilty of the public offense with which he was charged. We cannot agree that the failure or inability of the United States to prove in the criminal case that the defendant had been guilty of a crime, either forfeited its right of property in the timber or its right in this civil action, upon a preponderance of proof, to recover the value of such property."

But admitting that the defendant Tiberg had been acquitted, as in the case last cited, then the specific purpose for which the law took custody in the criminal proceedings has been entirely fulfilled, viz: the use of such fund as evidence or its use otherwise in connection with or as a result of such proceedings.

Therefore at the most, the purpose for which the Clerk held the moneys was for the return to Tiberg—if the law held the money for any other purpose, the fulfillment of such purpose might be conflicted with

by the enforcement on execution of any judgment in the case at bar. But the law holding these moneys for return to Tiberg and the complaint seeking ultimate relief, to which the appellant would be entitled if the moneys were actually in Tiberg's possession, it is obvious that no conflict can arise.

The appellant would be entitled to the impressing of a trust upon the money if it had been in Tiberg's possession.

See cases cited in Opening Brief, pp. 13-20.

Appellant would doubtless have been entitled to the appointment of a receiver of the money to take possession *pendente lite.*

Therefore, we contend on the proposition of the acquittal of Tiberg on the criminal charge, it is immaterial whether the money is in the custody of the Clerk for the purpose of the return to Tiberg or whether the money is in Tiberg's actual possession.

Tiberg could not complain of its return to him and certainly cannot claim any more rights because of the fact that the Clerk holds the money for the purpose of returning it to him, than he could if the Clerk had in fact returned it to him. It is Tiberg's own contention that the duty of the Clerk is to return the money to him. That is the argument of appellee. Under the equitable doctrine that the law considers that as done which should have been done, it seems to us that for the purposes of this case the possession

of the Clerk, while technically custody of the law, is, by implication of law, the custody of Tiberg.

The case being somewhat analogous to those instances where after a person who is entitled to a fund is ascertained, together with the amount to which he is entitled, the custodian in the law then becomes the agent of such party and his possession is the possession of the person ascertained to be entitled to the property.

From the authorities cited in our opening brief it is clear appellant could impress a trust upon these moneys if found in the pocket of Tiberg. And in proceeding against the possession of the Clerk upon the theory that the Clerk's possession is in all legal aspects the possession of Tiberg, it would be seeking no greater rights than it would have had, if the Clerk had turned the moneys over to Tiberg.

On the other hand, if the defendant Tiberg had been convicted in the criminal proceeding, it could hardly be argued that appellant would be powerless to maintain the action. What other remedy would be available to it? The fact of the conviction of Tiberg would not be a judgment that these properties belonged to appellant. They are not the stolen goods in specie. The procedure under Section 2378 of Chapter Thirty of the Criminal Code of Alaska would not be open to it. It must prove that these moneys are the proceeds of its property stolen from it, and the only method open to it, under the allegations of the bill, is by a proceeding in equity. This we think we have conclusively established by the cases cited in

our opening brief, which hold that even in the absence of any showing of a fiduciary relationship, a constructive trust may be established where the proceeds of the stolen property are identified, but here, as the amended complaint in terms alleges, there was a fiduciary relationship, a definite identification of the proceeds of the stolen goods and an allegation of insolvency.

The case of *State* vs. *Williams,* cited by appellee as conclusive of his rights, was an action where, after an acquittal of the defendant, money was in the hands of the Clerk. The defendant filed a motion for an order for the return of the money to her, which motion the Court denied. Against the objections of the defendant, the Court ordered a jury to be called to try the title to the money. The defendant filed a motion to dismiss the case, which was overruled. A trial to a jury was had, resulting in a verdict for the claimant of the money, the prosecuting witness in the case. The Court on appeal said:

> "If the defendant had been *convicted* of stealing the money in question, the duty of the District Court would here have been clear. Section 465 of the Code provides that 'if the property stolen or embezzled has not been delivered to the owner, the Court before which the conviction was had may, on proof of his title, order its restoration. . . . The Court we presume, might properly proceed to determine such question in a summary way . . . But we have a case where the defendant was acquitted. . . . For such a case the statute *seems to make no provisions.* The

> money having been forcibly taken under a bench warrant from a person presumably innocent, it would seem to follow as a matter of course, that the person holding the money in custody would deliver it to the person from whom it had been thus taken. *We do not say* that the judgment of *acquittal* was conclusive evidence of title in the defendant, *all we hold is* that this action having been terminated in the defendant's favor, she was entitled to go out of court and be placed in the same situation in which she was before the money was taken, leaving Miller or any other person who may claim the money, *to pursue his remedy by action in his own name."*

This is exactly what appellant did in the present case. Appellee cannot complain because appellant elected to pursue his remedy in equity and follow the proceeds of the stolen property, and ask the Court to *preserve it* by its order. Had appellant pursued the same remedy that the plaintiff did in the case cited, it would have been up to appellee to argue that appellant "must proceed by independent action in his own name"; and properly so. Besides, it is to us a new and novel proposition that a third party can intervene in a criminal case and create new issues.

As we have hereinbefore stated, under the Alaska Code no provision is made for the disposition of other than stolen or embezzled property. No mention is made of the proceeds of such property. Section 2377 of Chapter Thirty of the Criminal Code is the only section which mentions other property taken from the arrested person, but is silent as to its disposition.

The Alaska Statute (Sections 2374-2378, Criminal Code) differs from the Iowa Statute controlling in the Williams case, in that it authorizes the delivery of stolen property to the owner, if claimed, irrespective of conviction or acquittal. Had the stolen property been in specie in the custody of the Clerk, the appellant might have availed itself of this section of the code. But the *proceeds* only of such stolen property being accessible, it was necessary to resort to this bill in equity to establish appellant's equitable title hereto.

Bearing in mind that under the rule prevailing in the United States a civil action may be carried on *pari passu* with the criminal prosecution, any judgment in such civil action might, if the Court below was correct in its ruling, be rendered absolutely nugatory by reason of the power of the appellee, if acquitted prior thereto, to demand the return of the property sought to be impressed with the trust and claimed by the appellant and in the possession of the Court; and which doubtless he would be able to do in the absence of any order of the Court restraining him from so doing, or its officers from acting upon such demand.

A court of equity declining to exercise its jurisdiction over property in its custody in order to preserve the same pending a determination of the question as to whether or no it was the proceeds of property of complainant seeking to establish a trust therein (though such custody arose on the criminal side of

the Court), would thus be lending an admitted felon its aid in disposing of the fruits of his crime so as to place them beyond the reach of the law.

We contend that on the contrary, the Court should "*jump all technicalities* and be as astute in discovering "a remedy for upholding the rights of a party as the "thief is in discovering ways and means of cheating "him out of his property and the avails of it."

Newton vs. *Porter,* 5 Lans. (N. Y.), 416;
See Opening Brief, p. 7.

Counsel seek to minimize the effect of the cases cited by us in opening and refers especially to the case of *United States* vs. *Carter,* 172 Fed., 1, and 217 U. S., 49, L. Ed., 769, as being overruled by the later case of *United States* vs. *Bitter Root Development Co.,* 200 U. S., 472, 50 L. Ed., 561, as opposed to it.

We think that case is an argument in our favor. There a bill in equity was filed for the purpose of recovering the value of certain timber alleged to have been wrongfully cut from lands of the United States and converted to the use of the defendants. The demurrer interposed was sustained on the ground that the Court had no jurisdiction in equity as plaintiff had an adequate remedy at law, and the bill dismissed. When the case reached the Circuit Court of Appeals for this Circuit, the decree of the lower Court was sustained on the ground that the bill really set forth a series of trespasses, and displayed no equitable

characteristics, there being no *fiduciary* relationship, *no insolvency* alleged and *no identification of the proceeds* of the timber stolen.

In this connection this Court refers to the cases of *Newton* vs. *Porter,* 69 N. Y., and the *American Sugar Refining Co.* vs. *Fancher,* 145 N. Y., 552, 40 N. E., relied upon by us in our opening brief and distinguishing those cases say they—

> "are cited to sustain the doctrine that such a trust may arise through a *tort.* In the first of these cases it was held that the owner of negotiable securities stolen and afterwards sold by the thief might follow and claim the proceeds in the hands of the felonious taker and that this right attached to any securities or property in which the proceeds may have been invested, so long as such proceeds could be traced and identified. But in that case the original *tort feasor was insolvent. There was no remedy at law. No redress was possible unless the owner could proceed in equity to charge with a trust the property in which the stolen securities were invested.* So in the case of the *American Sugar Refinery Co.* vs. *Fancher,* the sale of the personal property had been induced by fraud on the part of the vendee, and the property was by him sold to another. *The proceeds of the sale were specifically identified in the hands of the latter. Since the vendee was wholly insolvent it was held that a Court* of equity had a remedy to reach such proceeds and apply them for the benefit of the defrauded vendor. *No such facts are presented in this case.* It is not alleged that any of the defendants is *insolvent.*"

So, too, when the case reached the Supreme Court

of the United States the decree was also affirmed on practically the same grounds. That Court, referring to the two cases cited in the opinion of the Circuit Court of Appeals, said in showing that the Bitter Root case did not present the same state of facts:

> "These cases, as will be seen upon examination, show that the plaintiff *had no remedy at law* and *he was able to fully identify the particular property into which the original property belonging to him had been converted* and which was in the hands of a voluntary assignee. It was a question of following the proceeds and accurately and certainly identifying them, which the Court held was necessary to permit of such following. *The defendants were also insolvent.* . . . There is no pretense in this case that any specific piece of property was in fact either the same timber *or the proceeds of the timber wrongfully cut and disposed of by the defendants or any of them.* . . . On the contrary it was alleged in the bill that the complainant *was unable to show just when or by whom the cutting had been performed or the logs manufactured into lumber had been sold.* . . ."

All of the elements lacking in the Bitter Root case are found alleged in the case at bar.

Counsel for appellee, in their supplemental brief, make the point that because we alleged appellant was not an inhabitant of Alaska, the provisions of Sec. 1316 of the Compiled Laws of Alaska are applicable. Therefore that appellee failed to object to the jurisdiction of the Court below because of the fact that

he owned the property in controversy, which was there in the District.

Whatever right appellant had to object to the jurisdiction of the Court, he waived by his appearance by demurrer.

Section 1331, Compiled Laws of Alaska.

Insofar as his action was controlled by the fact that the Court would have jurisdiction because of the presence of his personal property in the District, and the admission of his ownership by us because of the allegation referred to in our bill, we have no quarrel. We are willing to concede his legal ownership of the funds in the possession of the Clerk, which as we assert is for all the purposes of the action, the possession of the appellee himself. What we are asking is not a determination of whether appellee has the legal title or not to this property. That he has may be admitted. We ask that those funds be declared trust funds to which appellant is equitably entitled by reason of the fact that they constitute the *proceeds* of appellant's stolen property and to which trust funds a lien has attached to the extent of the value of those stolen properties. To the extent of that value the equitable title of the said proceeds should be deemed to be and is in the appellant.

As we said in opening, we are not here seeking, upon the sufficiency of proof, upon pleadings and evidence, to establish our equitable title to these funds,

but endeavoring to determine whether the allegations of the bill deemed admitted by the demurrer are sufficient to set up such a constructive trust as will enable us to go further and prove our equitable title to these proceeds.

We submit upon the allegations of the bill we are entitled to the relief prayed for and ask a reversal of the decision of the Court below.

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